United States Court of Appeals for the Second Circuit



APPENDIX

74-2393

Appeal Courts set

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U. S. COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 74-2393

SECURITIES AND EXCHANGE COMMISSION

PLAINTIFF APPELLEE

- AGAINST -

RES EARCH AUTOMATION CORPORATION KONSTANTINOS M TSERPES BASIL MARTOS ATHAN HAMOS

DEFENDANT APPELLANT

APPEAL FROM JUDGEMENT OF THE U.S. DISTRICT COURT FROM SOUTHERN DISTRICT OF NEW YORK

/2 CIVIL 3513

APPENDIX

KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS DEFENDANTS PRO SE 333 WEST 39 STREET NEW YORK, N.Y. 10018 TE1. (212) 947-1460



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UNITED STATES DISTRICT COURT

JUDGE RYAN

Jury demand date:

TITLE OF CASE

72 IV 3578

RESEARCH AUTOMATION CORP. jud. 3/7/74
ZONSTANTINGS H. THERPES jud. 8/7/74
RASIL MARTOS
THAN HAMOS

For plaintiff:

SECURITIES and EXCHANGE COMMISSION

New York Regional Office

26 Federal Plaza

New York, N.Y. 10007

Phone: 254-1614

For defendant: ACTOS & ATHAN HAS

333 West 30th Street

.e. York, M.Y. 10018

Thoma 947-1440

Michael Demetriou 29-14 Northern Blvd. L.I.C. N.Y. 361-0700

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Aug.21:-72	Filed Affidavit of Compliance with Rule 9(c)(h) of General Rules. Filed Affidavit of Service of 2 conformed copies of summons and complaint Filed Affidavit of Service of 2 conformed copies of summons and complaint	***
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Aug. 21-72	Filed Remorandum in support of Flaintiff's motion for tree inje	Saint Pr
Aug. 31-72	Basil Marton on 8/2h/72.by taking copies, with order to show cause and	4.5
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Aug. 31-72	Filed Affidavit of Service of summons and complaint upon Athan Hamos on 8/25/72. Filed Affidavit of Service of summons, complaint, show cause, afficavit and	*
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	with full force and offect, until further ore-r of this court, and offect, until further ore-r of this court,	-
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<u> </u>	of Research Automation Corp. (for further details see injunction in tile room) Mailed notices. It is further ordered that this Court	
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Jan 17-	3) iled Record on appeal to U.S.C.A. 2nd Circuit 1-72 the attached	1 + 466
	letter of 11-1-/4.	+60
Jan. 17-	73 Filed Supplemental Record on appeal has been certified & transmitto the U.S.C.A. 2nd Circuit.	1

72 Civil 3513 S.E.C. vs, Research Automation Corp., et al.

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RIPO

72 Civil 3513

Apr 3.73 Filed True copy of USCA mandate. Ordered that thes action is remanded
TREET to the SDNY Court to make further findings, etc. 3 Judge Court. Lumbard, CJ
&J Mansfield, Wyzenski. DJ.
Oct.3-73 Filed defts, affder & notice of motion to dismiss-Ret. 10-18-73.
Oct. 18-73 Filed memo endorsed on motion filed 10-3-73-No appearance in opposition
to motion by pltff. The relief sought by deft. is granted in full as
requested; submit order forthwith-So Ordered-Ryan, J.
Oct.23-73 Filed order vacating the order of preliminary injunction dated 11-8-72 and all parts of the complaint which is the subject matter of this
proceeding alleging violations of Sec. 5 of the S.E.A. 1933 be dismissed.
ct 30-73 Filed unsigned counter order
Oct.29-73 Filed notice of entry of order dated 10-23-73.
May 14.74 Filed Pitffs. Notice of Beposition of Research Automation Corp. by KKKKKK
Konstantinos M. Tserpes, Pres. on 5/20/74.
May 14.74 Filed Pitffs. Notice of Deposition of Basil Martos on 5/21/74.
May 21.74 Filed Pitffs. Notice of Deposition of Athen Hemos on 5/29/74.
May 29.74 Filed Defts. Notice of Deposition of William Nortman on 6/10/74.
May 29.74 Filed Defts. Notice of Deposition of Thomas R. Beirne on 6/11/74,
May 29.74 Piled Defts. Notice of Deposition of Mark N. Jacobs on 6/11/74.
Jun 10.74 Filed Order to Show Cause for a Protective Order with a Stayy Ordered
defts. Tserpes, Martos & Hamos appear on 6/21/74 & that deposition of
William Nortman, Thomas R. Beirne & Mark N. Jacobs are adjourned
pending resolution of pltffs. motion for a protective order. etc. Ryan J.
Bun 10.74 Filed Affidavit of Notice that Mati N. Jacobs XYXXXX gave notice of
the Order to Show Cause.
Jun 10.74 Filed Pltffs. Memorradum of Law.
Jun 10.74 Files Affidevit of Service by Eark K. Jacobs on 6/5/74.
Jun 10.74 Tiled Pluffs, Notice of hotion . Re: Striking Answers of defus, Research &
Jun 18.74 Filed Pittis. Memorandum of law.
Jun 18.74 Filed Pittfs. Affidavit of Service by Anthony R. KCamarata on 6/13/74.
Jun 16.74 Filed Pltife, Response to Defts, Request for Documents.
Jun 10.74 Filed Allidavit in opposition to pltifs, eppleiation for a protective order
& Strile Defts. Answer & Default Judgment etc. by Fonstantinos M. Tserpes.
Jun 20.74 Filed Memorandum of law in support of defts. Affidevit oppositing pltff.s
motion pursuant to ruels 26(c)& 37(d).etc.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

- against -

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES

BASIL MARTOS

ATHAN HAMOS

FINAL JUDGMENT AND ORDER

72 Civil 3513 (SJR)

MICROFILM

Defendants. AUG 7 1974

The Complaint in this action having been filed on August 17, 1972, and defendants Konstantinos M. Tserpes ("Tserpes"), Basil Martos ("Martos") and Athan Hamos ("Hamos") having served plaintiff Securities and Exchange Commission ("Commission") with an answer on September 12, 1972; and

Plaintiff having moved this Court for an order striking the answers of defendants Research Automation Corporation ("RAC") and Tserpes and granting judgment by default for permanent injunctive relief against them; and for a protective order vacating the proposed depositions of plaintiff's counsel, William Nortman, Thomas R. Beirne, and Mark N. Jacobs; and

Defendants having moved this Court for an Order permitting defendants to record the remainder of the depositions noticed herein, excluding certain alleged improper questions, and directing that all future depositions be held in the United States

Court House; and for an Order compelling the production by the

plaintiff of certain documents requested by the defendants; and

for leave of this Court to serve and file a proposed third party

complaint or counter-claim against the United States of America;

and

This Court having considered all the papers filed by both parties and having considered the reports of the Honarable Harold J. Raby, United States Magistrate, to whom these matters were assigned, issued on June 25, 1974 and July 17, 1974, and having considered the defendants' objections to these reports and having found such objections to be without merit; and there being no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the answer filed by the defendants on September 12, 1972 be and it hereby is stricken insofar as it speaks for defendants RAC and Tserpes, and that defendants RAC and Tserpes, their nominees, agents, servants, employees, attorneys, successors and assigns, and those persons in concert or active participation with them, and each of them, be and they hereby are permanently enjoined from, directly and indirectly, in connection with the offer, sale, or purchase of the shares of the common stock of RAC or any other security,

making use of the means or instruments of transportation or communication in interstate commerce or of any facility of any national securities exchange: (1) To employ any device, scheme, or artifice to defraud, or (2) to offer, purchase or sell securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any use, practice or course of business which operates or would operate as a fraud or deceit upon any person. AND IT IS FUTHER ORDERED, ADJUDGED AND DECREED that: (1) Plaintiff's motion for a protective order with respect to the depositions of plaintiff's counsel, William Nortman, Thomas R. Beirne, and Mark N. Jacobs be and it hereby is granted; (2) Defendants' motion to tape record the remainder of the depositions, to exclude certain alleged improper questions and to hold the depositions in the United States Court House be and it hereby is denied; (3) Defendants' motion to compel disclosure of certain documents by the plaintiff be and it hereby is denied; and -3-

(4) Defendants' motion for leave of this Court to serve and file a proposed third party complaint or counterclaim against the United States of America and/ or the Securities and Exchange Commission be and it hereby is denied.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

UNITED STATES DISTRICT JUDGE

Dated: New York, New York ang in 8 ? " , 1974

JUDGMENT ENTERED August 7, 1974

Paipmond & Butgliandt

CLERK

(4) Defendants' motion for leave of this Court to serve and file a proposed third party complaint or counterclaim against the United States of America and/ or the Securities and Exchange Commission be and it hereby is denied.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

UNITED STATES DISTRICT JUDGE

New York, New York aug m ? ? 1974

JUDGMENT ENTERED August 7, 1974

Paipmond & Busephanett

CLERK

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UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of day of one thousand nine hundred and

Securities and Inchange Commission.

Pinintliff-Appellac.

Research Automation Corporation Monstatines M. Tserpes Basil Martos Athen Mones

Defendants-Appallants

It is hereby ordered that the motion made herein by counsel for the appellee appellee appellee appellee

by notice of motion dated February 13, 1973, to remend the action to the United States District Court for the Southern District of New York parameters, appellant Having appeared pro-se and this court having advised said appellant, at length of the problems and danger inherent in be and an action of the problems and danger inherent in be and an action of the problems and danger inherent in the action of source.

Upon consideration thereof, it is

Updered that the action herein be and it hereby is remanded to the

White the first of selection in the district Court for the Southern
District of selection make further findings and with authority to
act as is finis to be warranted under the circumstances.

A. OSAECV JUIRAC .A

ELPORE: HOM. J. HOWARD LUMBARD,

HOH. WALTER H. HAMSFIELD,

HOM. CHARLES EDWARD WITAMOSI,

Clatrict Circuit Judges

felicitation has been been been been UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF HEM YORK SECURITIES AND EXCHANGE COMMISSION, Plaintill. 72 Civ. 3513 (SJR) - against -ORDER VACATING PRELIM-INARY INJUNCTION AND RESEARCH AUTOMATION CORPORATION, STRIKING PORTIONS OF KONSTANTINOS M. TSERPLS, COMPLAINT BASIL MARTOS, ATHAN HAMOS, Defendants. The defendants having moved to vacate the Order of Preliminary Injunction of MR. JUSTICE SYLVESTER J. RYAM, dated November 8, 1972, and to dismiss those parts of the Complaint in this proceeding alleging violation of Section 5 the Securities Act; and on October 18, 1073, the re said motion, the plaintiff having failed to appear and having failed to oppose said motion: it is hereby ORDEPED, ADJUDGED AND DECREED that the Order of Preliminary Injunction of MR. JUSTICE SYLVESTER J. RYAN, dated November 8, 1972, be and is hereby vacated: AND IT IT FURTHER, ORDERED, ADJUDGED AND DECREED that all parts of the Complaint which is the subject matter of this proceeding alleging violations of Section 5 of the Securities Act of 1933 be and the same are hereby dismissed. Catable 7- 300 1 100 Unfatu STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff.

REPORT OF UNITED STATES MAGISTRATE

72 Civ. 3513 (8JR)

-3

RESEARCH AUTOMATION CORPORATION, KONSTANTINGS M. TSERPES, BASIL MARTOS, ATHAN HAMOS,

Defendants.

TO THE HOMORABLE SYLVESTER J. RYAH, U.S.D.J.:

In this action brought by the Securities and Exchange Commission against the defendants, in which the S.E.C. seeks an injunction against the sale of certain securities of the defendant corporation, you have referred to me for review and recommendation the below-listed motions:

- 1. A motion by the plaintiff (by order to show eause) filed June 10, 1974, for a protective order vacating Thomas R. Beirne, Esq., proposed oral depositions of William Nortman, Esq., / and Mark N. Jacobs, Esq., all counsel to the plaintiff;
- 2. A motion by plaintiff filed June 18, 1974 for an order striking the defendants' answer and granting default judgment for the injunctive relief sought in the complaint, based upon the alleged failure of the defendants to subsit to an oral deposition heratofore duly noticed;
- 3. A cross-motion by the defendants, filed June 20, 1974, in which it is requested, among other things, that the defendants be permitted the use of a tape recorder during the remainder of their deposition, and that the deposition be hald in the Courthouse, and that certain alleged improper questions be excluded;

4. An application by defendants, filed Jume 20, 1974, pursuant to Rule 37, to compel production of documents heretofore requested by defendants under Federal Rule 34. (That application is based upon a response to defendants' Rule 34 request filed in court by plaintiffs on June 18, 1974.)

argument at my office on Friday June 21, 1974. At the scheduled hour of that date, counsel for the plaintiffs appeared and the three individual plaintiffs, Messrs. Teerpes, Martos and Hamos appeared pro se, and presumably, on behalf of the defendant corporation, in their capacity as officers thereof

Although the S.E.C. counsel, a Mr. Jacobs, indicated his readiness to proceed with oral argument, the defendants, through their spokesman Mr. Tserpes, objected to the proceedings, and made a "motion" to postpone same, on the ground that there was no Greek interpreter present in the courtroom. I summarily denied that "motion" for the following reasons:

1. Even assuming an inability on the part of the defendants in general, and Tserpes in particular, to speak and understand the English language, naither this Court nor counsel for the S.E.C. has any legal obligation, under the circumstances here present, to furnish an interpreter for the benefit of these defendants, including the corporate defendant. Granting that principles of justice.

**

In New York State practice, a corporation is not permitted to appear except by counsel. Since I find no such restriction in the Federal Rules of Civil Procedure, I shall assume, for purposes of my discussion, that an appearance of a corporation by its president is a valid appearance.

and fairness might, in an appropriate civil case, where the defendant is indigent, justify the engagement by the Court of an interpreter to protect the defendant's rights, there is no showing of indigency made in this case. On the eattrary, we are here dealing presumably with businessmen of supposed substance and with a corporation whose activities are of sufficient financial significance as to erouse the adverse interest of S.E.C. Under such eircusstances, the defendants, apparently, made no attempt whatsoever to engage an interpreter, notwithstanding their full swareness of the scheduled oral argument of their motions on June 21st - and who unaccountably insist upon appearing pro se instead of by an attorney, are not, in my opinion, entitled to have an interpreter appointed.

- 2. In any event, the claimed inability of
 Mr. Tserpes to speak and understand the English language,
 was, and is, in my view, a ploy and a patent fraud upon
 this Court. Notwithstanding Tserpes' insistence that he
 cannot speak and understand the English language adequately.
 I found him to be completely articulate (albeit offensively
 so) in his utterances before me, and I am convinced that
 he fully understood the proceedings held before me. That
 conclusion finds overwhelming support from a reading of
 the text of the recent depositions admitted to be conducted by the S.E.C., in which Tserpes was not only able
 to speak and understand English (as were the other
 individual defendants) but able to disrupt and abort the
 deposition by a tirade and a filibuster.
- 3. In any event, the application for an adjournment of oral argument was unnecessary because all of the matters before me could readily be decided on the basis of my examination of the papers submitted. Indeed, the balance

-5

in the papers submitted by the parties prior to the aborted argument of those motions on June 21, 1974.

I shall first direct my attention to the plaintiff's motion for an order striking the answer and granting default judgment in favor of the plaintiff because of the elaimed misconduct of the defendants, particularly their principal spokesman Tserpes, in making it impossible for the S.E.C. to proceed with oral depositions of defendants. I consider this motion first because, if, as claimed by the S.E.C., it is entitled to a default judgment for the relief demanded in the complaint (i.e., a permanent injunction) the other motions before me automatically become academic.

The S.E.C.'s motion for a default judgment is based upon what the record plainly discloses is a most outrageous and disgraceful sabotage by Tserpes of an attempt of the S.E.C. to take oral depositions of Tserpes and the other two individual officers of the corporate defendant.

A reading of the transcript of the depositions attempted to be taken by the S.E.C. respectively on May 20, 21, and 29 (copies of which are forwarded herewith) compels the conclusion that Tserpes, with the tacit acquiescence and approval of the other two individual defendants, all of whom have appeared in this action pieces, conducted himself in such a manner as to make a farce out of the judicial processes of this Court. Not only did Tserpes refuse to be sworn and refuse to enswer any relevant questions in his own deposition, but he outrageously injected himself into the depositions which the S.E.C. was trying to conduct respecting the other two defendants and in effect, by the process of filibuster made it impossible to depose the other two witnesses. The behaviour of this individual cannot be excused either in terms of his lack of

minutetanding of the English language or in terms of his lack of education. Taexpes has filed papers in connection with the motions under my consideration which indicate a high command of the English language and a high degree of intelligence. It is to be noted, moreover, in his initial session before your Honor, he stated in open court that he had taken courses in the law both in Europe and in the United States. Yet, this same person who is capable of conducting a tirade egainst the S.E.C. counsel in the English language in the course of his deposition or attempted deposition had the temerity to come before me, on the day set for argument of this motion, and suggest that because of his lack of command of the English language he was entitled to an interpreter and entitled to have this matter adjourned until the Court would see fit to supply him with the free services of an interpreter. Because of the contemptuous conduct of Tserpes, acting as the principal officer and legal representative of the defendant corporation, as reflected in the transcript of the depositions, I believe that the S.E.C.'s motion for a defoult judgment is entirely well founded, and I recommend that it be granted.

In the possible event that your Honor may disagree with my recommendation in the foregoing respect and may wish to consider the merits of the remaining motions, I shall discuss same briefly

The motion by the S.E.C. to vacate the proposed deposition of counsel for the S.E.C. should, of course, be granted. Only in the most extraordinary circumstances is it proper for a litigant to subject opposing counsel to a deposition, and no special circumstances such as to justify such extraordinary relief are shown to exist here. On the contrary, the defendants' notice to examine S.E.C. counsel is obviously another ploy, an attempt to harass the S.E.C. in the pursuit of its legal functions. I recommend that the plaintiff's

The defendants' motion to the effect that the examination of the defendants be resumed in the Federal Courthouse and that defendants be permitted to have tape recorders in the Courthouse for that purpose is merely, in my judgment, another manifestation of the desire of Tserpes and his co-defendants to be as obstreperous and obnoxious as possible, perhaps in the vain hope that their tactics may cause sufficient weariness to the Government prosecutors that the case may be abandoned. The motion is particularly obnoxious in view of the outrageous conduct of the defendants in the course of the incompleted deposition. The motion should be denied.

Finally, the defendants' application under Rule 37 to compel additional disclosure of documents should be denied, for the reasons set forth in the S.E.C.'s response to defendants' Rule 34 notice, which is forwarded herewith.

CONCLUSION

By way of recapitulation I recommend that the S.E.C.'s motion to strike the answer for default judgment be granted, with costs, in which event the remaining motions may be marked dismissed as academic. In the event that you do not wish to grant the motion for default judgment I recommend that the plaintiff's motion to vacate the proposed examination of S.E.C. counsel be granted and that the defendants' motions respecting the conduct of the deposition of the defendants be denied and also that their motion to compel further production of documents be denied.

Copies of this report have been mailed this date to counsel for the S.E.C. and to the defendants, who are advised that any objections to this report must be filed in your Chambers not later than ten days from the date hereof.

The following papers, considered by me in connection
with the above-mentioned motions are forwarded to you herewith:

1. Transcript of proceedings held before you on 8/31/72, filed in court 11/17/72;

2. Transcript of proceedings held before you on 10/18/72, filed in court 12/13/72;

3. Transcript of examination of K.M. Tserpes held on 5/20/74, not yet filed;

4. Transcript of examination of Basil Martos, held 5/21/74, not yet filed;

5. Transcript of continued examination of Rasil Martos held 5/22/74, not yet filed;

6. Transcript of examination of Athan Hamos, held 5/29/74, not yet filed;

7. Motion by plaintiff filed 6/10/74 for protective order, to which is attached affidavit of notice. memo of law in support of motion and affidavit of service;

8. Plaintiff's notice of motion (with accompanying memo of law), filed 6/18/74, for an order granting default judgment;

 Plaintiff's response to defendants' request for documents, filed 6/18/74;

 Defendants' affidavit in opposition to plaintiff's motions filed 6/20/74;

11. Defendants' memorandum in opposition to plaintiff's motions filed 6/20/76;

12. Defendants' application, filed 6/20/74, pursuant to Rule 37 F.R.C.P., to compel compliance with prior Rule 34 document request.

Dated: New York, N.Y. June 25, 1974.

Respectfully submitted,

HAROLD J. PABY UNITED STATES MAGISTRATE

cc:

William D. Moran
Regional Administrator
Attorney for Plaintiff
Securities & Exchange Commission
26 Federal Plaza
New York, N.Y. 10007
Att: Mark N. Jacobs, Esq.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND FXCHANGE COMMISSION:

Plaintiff, :

- against -

DEFENDANTS' OBJECTION TO THE REPORT OF THE UNITED STATES MAGISTRATE

-10

RESEARCH AUTOMATION CORPORATION : :
KONSTANTINGS M. TSERPES ::
BASIL MARTOS ::
ATHAN HAMOS :

72 Civil 3513(SJR)

Defendants, :

TO THE HONORABLE SYLVESTER J. RYAN, U.S.D.J.

Defendants strongly object to the report of the Honorable Harold J. Raby, United States Magistrate, dated June 25, 1974, on the following grounds.

1. Magistrate Raby denied defendants, all Greek speaking persons with little command of English speech, their fundamental right to an interpreter as authorized under Rule 43(f) of the Federal Rules of Civil Procedure. To proceed without an interpreter deprived them of their right to reply to the plaintiff's ral argument and left them at a decided disadvantage.

In his report, Magistrate Raby suggests that defendants should have provided their own interpreter. However, they were not given prior instructions to do this, and, indeed even the plaintiff had furnished an interpreter at the time and place of the deposition. The very least that the Magistrate should have done to demonstrate fairness was to adjourn the hearing so that the defendants could obtain an interpreter. Even if this were done, plaintiff would probably have objected to anyone hired by the defendants as they so argued against the defendants motion to furnish two tape recorders for objectively transcribing future depositions (see plaintiff's last response to defendants dated June 21, 1974).

2. Magintrate Raby was palpably hostile to the defendants and regretfully treated them in a demeaning and insulting manner. This treatment was unworthy of one occupying so important and responsible position in the system of justice.

The Magistrate did not use a court stenographer, but instead relied on a tape recorder. He silenced the defendants by shouting to them to "keep quiet", and indicated that his mind was made up before the hearing had hardly begun. Defendants have had to rely on shorthand notes taken by Anna Tserpes to assist their recollection of what transpired at the hearing (see exhibit annexed). Those notes reveal that the Magistrate overpowered the defendants and peremptorily declared that defendant Tserpes actions were a "filabuster and unruly". It was obvious that he neither considered or deliberated on defendants papers.

In view of the prior history of this litigation, where an earlier court order granting an injunction was issued, oblivious to defendants opposition papers, it is astonishing that the Magistrate would perpetuate the bias in plaintiff's favor.

Anyone reviewing the tape of this hearing would be hard pressed to concur in the Magistrate's judgement that Tserpes was articulate or offensive. Mrs. Tserpes' notes disclose that he stated nothing other than his desire for an interpreter, and that the Magistrate and Jacobs did all the talking.

3. In his reports, the Magistrate employs extreme language to describe Tserpes conduct at the deposition. He refers to his behavior as "a most outrageous and disgraceful sabotage", that it makes "a farce out of the judicial processes", that he was "contemptuous". All of that heat sheds little light on what actually transpired at the hearings.

-11-

Here, too, defendants must—rely on memory, because neither the Plaintiff nor the Magistrate have provided them with transcripts.

Nevertheless, in defendants' affidavit opposing plaintiff's motion to strike the answer, which were filed on 6/20/74, a complete account of the event s leading up to the deposition difficulties is recited. In substance, Mr. Jacobs attempted to compel the stenographer to strike from the record a colloquy that had taken place between Tserpes and Jacobs over the receipting of produced documents. This muzzling of an open and complete transcript underlied the actions of Tserpes.

When the Magistrate asserts that "only in the most extraordinary circumstances, is it proper for a litigant to subject opposing counsel to a deposition", he disregards the poignant Federal Rule 26(b)(3) which established the standard as "substantial need in the preparation of the case", where one is "unable without undue hardship to obtain the substantial equivalent by any other means".

It is not judicially characteristic for a Magistrate to charge one, who has presented legal arguments based on federal rules and judicial decisions, with exercising a "ploy", or to be "obstreperous and obnoxious", and "outrageous".

Defendants respectfully refer the court to the memorandum in law and affidavits dated June 20, 1974 which set forth their reasons, made in good faith, for believing they are entitled to take the plaintiff's attorneys' depositions.

The object of the discovery is to provide the parties with the opportunity to gather evidence in advance of trial and therefore to simplify the trial proceedings. The plaintiff has obtained information from the defendants during its own pre-litigation investigation, and again, at discovery. Surely, the defendants are entitled to

evidence from plaintiff that goes to the core of their charges. And, that evidence should be available, not at the discretion of the plaintiff, but under the authority of the Rules and court decisions. Although plaintiff argues that defendants possess all of the information which forms the basis of the charges and that their files contain only information obtained from others, defendants should be permitted to test this newest position of the plaintiff. Today, they contend that they have no direct knowledge, but in the original affidavit of Mark Jacobs accompanying the motion for a preliminary injunction, the plaintiff made positive accusations against the defendants. It appears that those allegations were based on oral interviews with stockholders, the written accounts of which were rendered by the plaintiff's staff. Nowhere does the plaintiff acknowledge receipt or existence of letters from these stockholders dated May 12, 1972, and which were annexed as exhibit "C" of the defendants opposition papers to the injunction motion, which contradict the conclusions set forth in Jacobs affidavit. Obviously, consideration of fair play and equity would dictate that the plaintiffs attorneys be compelled to submit to questioning on the existence and receipt of these letters and the weight assigned to them in its reports and recommendations to the Commission.

4. The Magistrate intimates that defendants are trying to "harass" the plaintiff and cause them "sufficient weariness" to encourage abandonment of the case. It should be noted that the plaintiff has procrastinated over this matter for two years. There is no merit to the claim that defendants have been dilatory. It is contrary to defendants' interest to have this litigation drag on. The innuendo that defendants wish to weary the plaintiff is a distortion of the record. The numerous motions and applications that have been brought were initiated by the plaintiff. Defendants seek only one objective,

-13-

a trial of the merits so that the plaintiff will be compelled to meet their burden of proving violations of the anti-fraud provisions of the Securities Acts.

5. Defendants urge that they be given their day in court and that the principles of fairness and due process prevail.

Both parties are entitled to equal treatment by the court and this applies to discovery proceedings, too.

To avoid the embittered quarrel that develops when one side rides rough shod over the other, and to maintain its intended neutrality, it is urged that the court monitor the taking of depositions and recording of the proceedings with a view towards supplying both sides with the legally permissable latitude of discovery

WHEREFORE, defendants respectfully request that the Magistrate's report be entirely dissafirmed, and that the court: 1)permit defendants to take the deposition of counsel for the plaintiff, 2)deny plaintiff's motion to strike defendants answer and enter a default judgement, and 3)authorize the use of tape recorders to report the discovery proceedings.

DATED: NEW YORK, NEW YORK July 2, 1974

Respectfully submitted.

Laylanhemile

KONSTANTINOS M. TSERPES

BASIL MARTOS

ATHAN HAMOS

Defendants Pro Se 333 West 39 Street

New York, N.Y. 10018

Tel. No.: (212)947-1460

CC: Honorable Harold J. Raby United States Magistrate

William D. Moran Regional Administrator Securities and Exchange Commission 26 Federal Plaza New York, N. Y. 10007 Present: Mark N. Jacobs, Thomas Beirne - S.E.C.

Konstantinos M. Tserpes, Basil Martos & Athan Hamos - R.A.G.

Jacobs: to Martos - This paper is in reply to your answering affidavit and memorandum of Law

Martos: We received one last week.

Jacobs: This is something else dated today. This is in reply to your answer of the 20th.

Judge Raby: Government Counsel is here's to you have a court recorder here?

Jacobs: No, we just want a hearing.

Judge Raby: Yes, only a hearing.

Judge Raby: Since we don't have a court reporter and I have read the papers accordingly we can proceed without him.

Regarding matter between Securities and Exchange Commission aganist Research Automation Corportion, Konstantinos M. Tserpes, Basil Martos and Athan Hamos 72 Civil(:51: Jir).

Are the Counsel present - state your appearance for the records.

Jacobs: I am Mark H. Jacobs.

Beirne : My name is Thomas R. Beirne

Judget The defendants are appearing pro se?

Therpes: Yes

Tserpes: It is necessary we use interpreter.

Judgerl beg your pardon

Therpora It is necessary we have interpreter.

Judges bo we have an interpreter?

Taerpens We don't understand and need an interpreter.

Judge: I don't know why it is necessary you have an interpreter.

Jacobs: I am soing off the record - your honor, in one account Mr. Tserpes uned Mrs. Tserpes as an interpreter.

Tserpess The is not capable.

Jacobs: In the depositions we did have a court interpreter.

Judge: He should supply his own Interpreter and if he doesn't see fit to have his own interpreter, this court doesn't require an interpreter.

Judge: to Trerper - Mr Tserper, is it?

Therpess Yes

Judge: Mr. Therpes has stated be cannot proceed without an interpreter. However, he has stated that he hasn't supplied an interpreter. Therefore, this proceeding will proceed without an interpreter.

Judge: Mr. Martos and Mr. Hamos bere?

Marton & Hamons (both replied) yer.

Therpeta We need an interpreter

Judge: SIT YOWN (QUITE DOUD) YOU WILL NOT INTERRUTE THE COURT AGAIN - YOU UNDERSTAND?
YOU WILL NOT INTERRUFT THE COURT AGAIN.

Therpes: It is necessary to use an interpreter - it is my right.

Judge: Now it is my understanding No. 1 motion has been brought by the plaintills for protective order staying the examination of their files and the 3 gentlemen who I believe are counsel for the S.E.C.

Second motion is to strike out the answers and default judgement due to failure on the part of the defendant to appear and testify as required in the notice by the S.E.C. and motion filed by defendants June 20th which nearly as I can understand is to permit tape recorders for depositions taken. Is that Is that your understanding Mr. Jacobs?

Jacobs: I believe it is sir.

Judge: The fourth motion is by defendants pro se in response to yours and rule 34 and its application.

I will hear the counsel for the Covernment, and try to be as brief as possible.

Jacobs: I will try your honor - I will try to be as brief as I can. I would like to start in what began as this motion to strike out the answer of the defendant. The plaintiff had issued a deposition of defendant Research Automation Corporation by its Iresident, Mr. Iserpes and the deposition to be taken on the 20th at 9:30 A.M. at the S.E.C. Office. However, Mr. Tserpes was delayed over an hour demanding to see Mr. Moran, Regional Administrator of the S. E.C. He wanted to give a letter that he prepared and the attached documents. After an hour finally we went in and at that time I outlined to Mr. Tserpes the rules of the deposition, that deposition would be taken and afford him the opportunity to take oath. As a matter of fact I stated to him at least 5/6 times and each time he refused and did not want to be sworn in.

Judge: Wait a minute - you took a deposition of Tserpes, and you also had depositions on the other two.

Jacobs: Yes they were taken the following day and the following week and he hampered our taking, the depositions. In the case of Bourne versus Romero, appearing is not enough if he refused to be sworn in, within Rule 37 and the actions of Mr. Tserpes can be characterized as nothing but willful in view of the fact that he was given the opportunity several times and he refused each time and in view of the fact the following day and following week he prevented the plaintiff from taking the deposition of Mr. Martos and Mr. Hamos. His conduct should be considered unruly.

Judge: You may assume the familiarty on my part on the transcripts, I read them.

Tserpes: I would like to make a motion

Judger junt a moment planse.

And it is quite obvious before it becomes academic and we don't want to go int that and I have read the transcripts and I am natisfied and the conduct of Mr. Therpes actions were filabuster and unruly in the court and under the circumstances this court intends to resommend that the answer be striked out and default be recommend and your request for protective order be recommended.

In due course a report will be prepared by me and mailed to the coursel of CEC and the report mailed to the individual defendents and they will have 10 days to file any objections in which it to be returned to Judge Ryan who is in charge of these proceedings.

Therpen: I have a motion.

Judger What is your motion?

Therpen: I can't understand about the processing of this

Judge: You speak very articulately, and you have two associates.

Therper: They don't understand

Judge: BE QUIET (quite loud again) I am in charge of this court, I will have no more and I am directing as officer of this court this proceeding be closed. A copy of this transcript will be sent to Judge Hyan.

Therpess It is my right to have an interpreter by law I understand?

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SECURITIES AND EXCHANGE COMMISSION.

Plaintiff, : REPORT OF IMITED STATES MAGISTRATE

-17-

RESEARCH AUTOMATION COPPORATION. KONSTANTINOS M. TSERPES, BASIL MARTOS, ATHAN HAMOS.

72 Civ. 3513 (CJR)

Defendants.

TO THE HOMORABLE SYLVESTER J. RYAN, U.S.D.J.:

.This report relates to a motion, filed by the individual defendants herein on June 26, 1974, for leave to serve and file a proposed third party complaint, characterized by movahts as a "counterclaim" against the United States as defendant. The motion, which has been referred by you to me for hearing and report, is purportedly brought pursuant to Rules 13 and 14 of the Federal Rules of Civil Procedure.

Since Rule 14 by its terms relates solely to the service of third party complaints upon "a person not a party to the action who is or may be liable to [defendant] for all or part of the plaintiff's claim against him ... ", it is quite obvious that Rule 14 is totally inapplicable to the relief sought by this motion.

However, to the extent that the motion seeks leave to amend the answer by pleading a counterclaim against a party other than the original plaintiff, the motion could, from a procedural point of view, be considered as properly made pursuant to the provisions of Rules 13 and 15. So considering the motion, I turn to a discussion of the substantive merits of the motion.

The sist of the proposed new pleading is clearly stated in paragraph 3 of the moving affidavit of

Konstantinos M. Tserpes, as follows:

America arises out of the transaction and occurrence that is the subject matter of the claim in the prime action, to wit, the issue of deliberate and malicious false accusations against the third party plaintiff by the Securities and Exchange Commission, as an agent of the United States of America.

Accepting the above-quoted allegation as the

movant's orm synopsis of the proposed "counterclaim" against the United States. I must conclude that the application for leave to plead such counterclaim ought to be denied, since the proposed counterclaim is clearly beyond the jurisdiction of this Sourt, for the reasons which follow.

- narized in the above-quoted nortion of the moving affirmation, is nurely and simply a charme that the United States, acting through its agent, Securities and Exchange Commission, has engaged in malicious prosecution of the defendants. Towever, the United States as a sovereign, has never granted its consent to be sued for malicious prosecution. Although, under the Tort Claims Act, Title 28 U.S.C. Section 1346(h), Congress has in fact permitted the United States to be sued for cortain torts, it is also expressly and specifically provided in Title 23 U.S.C. Section 2630(h) that the provisions of the Tort Claims Act shall not apply to any suit for malicious prosecution.
- fact consented to be sued for malicious prosecution, it is also well settled that no such action for malicious prosecution would lie as a 'counterclaim' inasmuch as the law requires that in order for a suit for malicious prosecution/he maintainable, the litigation which

-18-

prosecution must have terminated in favor of the person asserting the claim of malicious prosecution.

Thus, as stated by Judge Bryan of this Court in the case of Slaff v. Slaff, 151 F. Supp. 124 (S.D.H.Y. 1957), a case involving a motion to dismiss a counterclaim for malicious prosecution:

attempt to allege a claim in the nature of malicious prosecution...it is totally defective... It is a prerequisite to such a claim that the prosecution or action which is have previously been determined in favor of the plaintiff."

Another good statement of the Rule requiring "favorable termination" of the suit which is alleged to be the subject of málicious prosecution is contained in Judge Weinfeld's opinion in the case of Rosemont Enterprises v. Random Mouse, Inc., 261 F. Supp. 691 (S.D.H.Y. 1966):

"And even if the action were instituted by plaintiff maliciously and without probable cause, the action in favor of the defendants for malicious prosecution does not lie unless and until the claimed malicious suit has been terminated favorably to the claimant, which is but one of the essential elements of the

Although, as hereinabove stated, the defendants describe their proposed counterclaim as one charging the United States with the tortious offense of malicious prosecution, I note also that in paragraph 1 of the proposed counterclaim, defendants allege that the Court has jurisdiction, not only under the Tort Claims Act, but also under the "5th and 14th Amendments to the Constitution of the United States", as well as the Civil Rights Act, 42 U.S.C. Sec. 1983, the Securities Act of 1933 and the Administrative Procedure Act.

CIVET OUT AVAILABLE

While it is true that the Tucker Act, 23 U.S.C.

Sec. 1346(a) does vest jurisdiction in District Courts to
hear claims of a contractual or quasi contractual nature
(as distinguished from tort claims) arising under the
Constitution and laws of the United States, there is no
language in such statute which could support any conclusion
that the United States can be held thereunder in damages
for an assumed tortious violation by it of plaintiff's
Constitutional rights. Moreover, and in any event, the
jurisdictional limits of the Tucker Act do not exceed
\$10,000, whereas the proposed counterclaim in this case
speaks of \$6,400,000.

Similarly, the Civil Rights Act contains no consent by the United States to be sued. In addition, Section 1993 of Title 42 U.S.C., cited by defendants, relates exclusively to violations of Civil Rights committed under color of State law, whereas in this case the actions complained of were clearly taken under color of Federal law.

Finally, the Administrative Procedure Act, while allowing judicial review of alleged arbitrary administrative action on the part of Federal officials, does not purport to allow or authorize any damage suits against the United States or its officers or agencies by reason of such assumed arbitrary actions. It might be added, parenthetically, that to the extent the present proposed counterclaim could be construed as an attempt to strike individually at the S.E.C. lawyers who are prosecuting this case - by suing them for malicious prosecution - it is well-settled Federal law that said prosecutors are absolutely immume from suit, even assuming that they acted maliciously. Gregoire v. Biddle, 177 F.2d 579, 2d Cir. 1940, cert. denied, 339 U.S. 949, 1950; Yaselli v. Coff. 12 F.2d 396, 2d Cir. 1926, affid. 275 U.S. 502 (1977)

that the proposed third party complaint, or counterclaim (by whichever name it is called) is not subject to the jurisdiction of this Court; and therefore no useful purpose would be served by permitting the defendants to serve and file such proposed complaint or counterclaim.

It is accordingly recommended that the motion be denied in all respects.

Opies of this report have been mailed to the interested parties, who are hereby directed that any objections hereto must be filed at your Chambers within ten days from the date hereof.:

The following papers considered by me on this motion are forwarded herewith:

- 1. Notice of motion filed June 26, 1974 and supporting papers appended thereto;
- Affidavit in opposition to motion filed July 10, 1974, with affidavit of service;
- 3. Memorandum of law in opposition to motion filed July 10, 1974;
- Reply affidavit of Konstantinos M. Tserpes, sworn to July 10, 1974, not yet filed;
- 5. Defendants' memo of law in support of motion, dated July 10, 1974, not yet filed.

Dated: New York, N.Y. July 17, 1974.

> Respectfully submitted, HAROLD J. RABY UNITED STATES MAGISTRATE

CO: KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS
333 West 39 Street
New York, N.Y. 10018

RESEARCH AUTOMATION CORPORATION c/o Konstantinos M. Tserpes 333 West 39 Street New York, N.Y. 10018

WILLIAM D. MOBAN
Regional Administrator
Securities & Exchange Commission
26 Federal Plaza, N.Y.C.
Att: Mark H. Jacoba Esq.

UNITED STATES DISTRICT COURT : SOUTHERN DISTRICT OF THE YORK

SECURETIES AND EXCHANGE COURTS SOON

72 Civil 3513 (SJP)

Pholostiff

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Dans thates, objection to the result of ant entrice

PESFARCH APPEARANTED COMPANY TYPES POSTEANTINGS AND THEPES PASIL MARIE ATHAN MANGE

Defendants.

TO THE MORPHABLE EVENESITE 1. RYIN, U.S.D. 1.

Defendants herein compactfully object and take exception to the Report of Honorable Barold J. Paly, United States Magistrate dated July 17, 197; on the collecting recommunity

palicious procedulos, for rather conduct akin to malpractice by attorneys of the Sa maities and Exchange Consission. Malpractice is not creloded as an actionable term which way be breight against the United States of America (Marthews v. United States 456 F 2d 395). Cosmission attorneys ested medicantly improdestly and carefronts in continuing and per in ing in the procedution of an injunctions state the defendance, and in prolonging the administrative human set to defendance less after their exercise of administrative extra terminant. The injunity remount of the United Protococcus or spring the Counter to the Contract was confronted with sufficient and complete trees for the tractice of the United Protococcus for the first terminant.

did not violate the anti-fraud provisions and rules of the securities laws. That the Commission was made aware of these facts can be inferred from the admissions contained in affidavits of their attorneys in which they concede that their entire information came from stockholders and others interviewed during the preliminary investigation, and no information was the result of personal knowledge (affidavit of Mark N. Jacobs dated June 3, 1974 pp. 2-3). It was obvious that when this Court, with the consent of the Commission, dismissed the charges that stock had been illegally sold to the public, it recognized that the stockholders were private persons to whom stock could be sold excempt from registration. That recognition stemmed from the absolute support that the private stockholders gave to. the Corporation. Without adverse information from the stockholders , the substance of the Commission's charges crumbled and by continuing to prosecute their action to the detriment of defendants they caused irreparable harm and damage to the defendants. Surely, the limitations and exceptions to the sovereign waiver of immunity expressed in the Torts Claims Act, Title 28 USC 1346(b), 28 USC 2680(a) (b), were not designed to grant escape to the federal government due to the malpractice of its lawyers, anymore than it was planned to excuse the negligent conduct of its doctors and air traffic controllers. There are striking similarities between medical malpractice (Beech v. United States 345 F2d 872) and the operational negligence of federal dir controllers (Ingham v. Eastern Air Lines, Inc. 373 Fig. 227, cert. denied 389 US 931), and the malpractice of the Commission's lawyers.

It is urged that the defendants application must be granted unless it is indisputable that the plaintiff can prove no set facts in support of their claim which entitles them to relief. (Conley v. Gibson 355 US 41). If it is conceivable that they can establish facts and circumstances which will permit recovery, the leave to serve the proposed complaint should be allowed (Matthews v. U.S. supra at p. 399).

2. It is true that Title 42 USC 1983 offers a remedy to one deprived of legal and constitutional rights, privileges and immunities by persons acting under color of state law. . (Williams v. Rogers 449 F2d 513). However, that it is primarily directed against state wrongdoing in view of the historical background anteceding the statute, does not foreclose its applicability to federal wrongdoing. The statute is not exclusively intended to bar state officials from injuring citizens. Together with Section 1985 it is aimed at preventing the loss of civil rights against anyone's wrongful conduct. To otherwise construe the sections would be to diminish the plan of Congress and the practical effect of its conferred benefits (U.S. ex rel Moore v. Koelger 457 F2d 892). It is interesting to note that there has been no definitive ruling on this point by the United States Supreme Court to date, although there was dictum by one Justice affirming the immunity of federal officers (opinion of Mr. Justice Harlan in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics 403 U.S. 388, 398).

SECURITIES AND EXCHANGE COMMISSION

Plaintiff.

72 Civil 3513 (SJR)

-against-

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:

NOTICE OF DEPOSITION

RESEARCH AUTOMATION CORPORATION, et al.

Defendants,

SIF3:

PLFASE TAKE NOTICE that defendants Konstantinos M. Tserpes, Basil Martos, and Athan Hamos, will take the deposition upon oral examination pursuant to Rule 30 of the Federal Rules of Civil Procedure of Mark M. Jacobs, on Tuesday, June 11, 1974 at 10:60 A.M. at the office of Research Automation Corporation, 333 West 39 Street, New York, M.Y. 10018 before a person authorized to take oaths and that said deposition will continue from day to day until completed. You are invited to appear and cross-examine.

PLEASE TAKE FURTHER MOTICE that the witness will be required, pursuant to Rule 30(h)(5) of the Federal Rules of Civil Procedure, to produce the following original documents at the time of said deposition:

- (1) Any and all records, reports, statements, tapes, transcripts, documents, correpsondence, and memoranda in the files of the Securities and Exchange Commission pertaining to the preliminary investigation of the defendants relative to the application of Research Automation Corporation for an exemption pursuant to Regulation A.
- (2)Original statements taken from officers, directors and employees of Research Automation Corporation.

- (3)Original statements taken from any and all other persons pertaining to the conduct and activities of Pescarch Automation Corporation and the other defendants.
- (#)Peports, correspondence and memoranda relating to a personal inspection by Mark Jacobs of the records, books and documents of the defendants.
- (5)All records, documents, reports, correspondence and memoranda obtained and related to a search of the records of the U.S. Patent Office pertaining to the Automatic Unloading, Transfer and Packaging Unit.
- (6)Original tapes and transcripts of the interviews of nine stockholders named in Jacob's affidavit of August 22, 1972.
- (7) Reports, memoranda, and takes or transcripts of telephone conversations and interviews with other stockholders of Research Automation Corporation.
- (8)Original questionnaire malled in by 83 stockholders of the Corporation to the S.E.C.
- (9) Records, reports, correspondence, statements, and other documents obtained by subnocen from the frauntrial Develorment Comperation of Greece.
- (10)Pecords, reports, correspondence, statements and memoranda obtained by subpoena from the Atlantic Bank of New York

Dated: May York, New York May 29, 1974

Sincerely,

Konstantinos M. Tserpes Racil Martos Athan Hamos 333 West 39 St. New York, N.Y. 10018 Telephone: (212)947-1460

:OT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

72 Civil 3513 (SJR)

Plaintiff,

NOTICE OF DEPOSITION

- against -

RESEARCH AUTOMATTON CORPORATION, et al. :

Defendants.

SIRS:

PLEASE TAKE NOTICE that defendants Konstantinos M. Tserpes, Basil Martos, and Athan Hamos, will take the deposition upon oral examination pursuant to Rule 30 of the Federal Rules of Civil Procedure of William Nortman, on Monday, June 10, 1974 at 10:00 A.M. at the office of Research Automation Corporation, 333 West 39 Street, New York, N.Y. 10018 before a person authorized to take oaths and that said deposition will continue from day to day until completed. You are invited to appear and cross-examine.

PLFASE TAKE FURTHER NOTICE that the witness will be required, pursuant to Rule 30(b)(5) of the Federal Rules of Civil Procedure, to produce the following original documents at the time of said deposition:

- (1) Any and all records, reports, statements, tapes, transcripts, documents, correspondence, and memoranda in the files of the Securities and Exchange Commission pertaining to the preliminary investigation of the defendants relative to the application of Research Automation Corporation for an exemption pursuant to Regulation A.
- (2)Original statements taken from officers, directors and employees of Research Automation Corporation.

- (3)Original statements taken from any and all other persons pertaining to the conduct and activities of Research Automation Corporation and the other defendants.
- (4) Reports, correspondence and memoranda relating to a personal inspection by Mark Jacobs of the records, books and documents of the defendants.
- (5)All records, documents, reports, correspondence and memoranda obtained and related to a nearch of the records of the U.S. Patent Office pertaining to the Automatic Unloading, Transfer and Packaging Unit.
- (6)Original tapes and transcripts of the interviews of nine stockholders named in Jacobs affidavit of August 22, 1972.
- (7) Reports, memoranda, and tapes of transcripts of telephone conversations and interviews with other stockholders of Research Automation Corporation.
- (8)Original questionnaire mailed in by 83 stockholders of theCorporation to the S.E.C.
- (9) Records, reports, correspondence, statements, and other documents obtained by subpoena from the Industrial Development Comporation of Greece.
- (10) Records, reports, correspondence, statements and memoranda obtained by subpoena from the Atlantic Bank of New York

Dated: New York, New York May 29, 1974

Sincerely,

KONSTANTINOS M. TOERPEO RALIL MARTOS ATHAN NAKOS 383 West 39 Street New York, N.Y. 18018 Telephone: (212)947-1460

ONLY COPY AVAILABLE

Securities and Exchange Commission

Plaintiff.

72 Civil 3513 (SJR)

- against -

NOTICE OF DEPOSITION

Research Automation Corporation, et al. :

Defendants,

SIR S:

PLEASE TAKE NOTICE that defendants Konstantinos M. Tserpes, Basil Martos, and Athan Hamos, will take deposition upon oral examination pursuant to Rule 30 of the Federal Rules of Civil Procedure of Thomas R. Beirne on Wednesday, June 11, 1974 at 10:00 A.M. at the office of Research Automation Corporation, 333 West 39 Street, New York, N.Y. 1001 as a person authorized to take oaths and that said deposition will continue from day to day until completed. You are invited to appear and cross-examine.

PLEASE TAKE FURTHER NOTICE that the witness will be required, pursuant to Rule 30(b)(5) of the Federal Rules of Civil Procedure, to produce the following original documents at the time of the said deposition:

- (1) Any and all records, reports, statements, tapes, transcripts, documents, correspondence, and memoranda in the files of the Securities and Exchange Commission pertaining to the preliminary investigation of the defendants relative to the application of Research Automation Corporation for an exemption pursuant to Regulation A.
- (2)Original statements taken from officers, directors and employees of Research Automation Corporation.

2.

(3)Original statements taken from any and all other persons pertaining to the conduct and activities of Pescarch Automation Corporation and the other defendants.

(4) Reports, correspondence and memoranda relating to a personal inspection by Mark II. Jacobs of the records, books and documents of the defendants.

(5)All records, documents, reposts, correspondence and memoranda obtained and related to a search of the records of the U.S.Patent Office pertaining to the Automatic Unloading, Transfer and Packaging Unit,

(6)Original tapes and transcripts of the interviews of nine stockholders named in Jacobs' affidavit of August 22, 1972.

(7) Reports, memoranda and tages or transcripts of telephone conversations and interviews with other stockholders of Research Automation Corporation.

(8)Original questionnaire mailed in by 83 stockholders of the Corporation to the S.E.C.

(9) Records, reports, correspondence, statements, and other doc uments obtained by supposena from the Industrial Development Corporation of Greece.

(10)Records, reports, correspondence, statements and memoranda obtained by aubpoena from the Atlantic Bank of New York.

Dated: New York, New York May 29, 1974

Sincerely,

MONETAINTHOS M. TOURDES
BASIL MARTOS
ACHAH HAMOS
333 West 39 Street
New York, M. Y. 10018
Telephone: (212)947-1460

SECURITIES AND EXCHANGE COMMISSION: 72 CIVIL 3513 (SJR)

Plaintiff. :

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS APPLICATION FOR A PROTECTIVE ORDER AND

MOTION TO STRIKE DEFENDANTS ANSWER AND

ENTER JUDGMENT BY DEFAULT, AND CROSS

MOTION FOR NON STENOGRAPHIC RECORDING

AND LIMITED EXAMINATION OF DEFENDANTS

- against .

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES

BASIL MARTOS

ATHAN HAMOS

STATE OF NEW YORK COUNTY OF NEW YORK)

KONSTANTINOS M. TSERPES, being duly sworn, deposes and says:

- 1. I am one of the defendants in this action and President of Research Automation Corporation. Further I am familiar with. all of the underlying facts and of the proceedings heretofore conducted.
- 2. My affidavit is submitted for a threefold purpose: a)in opposition to the plaintiff's application for a protective order which requests that depositions not be taken from Messrs. Jacobs, Beirne and Nortman. b) in opposition to plaintiff's motion to strike out defendants answers and to enter judgement by default. c)in support of a cross motion by defendants Terpes, Martos and Hamos for relief pursuant to subdivision (b)(4) and (d) of Rule 30 of the Federal Rules of Civil Procedure.
- 3. The notices of deposition served on Messrs, Jacobs, Beirne and Nortman on May 29, 1974 call for the production of "documents and other tangible things" as specified in Rule 26 of the Federal Rules of Civil Procedure. These documents were obtained and prepared by the noticed attorneys as both investigators and attorneys for the Commission. Defendants have a substantial need for these materials in the preparation of their case for trial and are unable to obtain the

substantial equivalent in any other way. Many of these documents stem from interrogations and interviews of stockholders conducted at the Commission. One of the written records is the stenographic report of the deponent's own interrogation. It is essential that defendants have access to this material so as to compare its contents with the charges. and summarized evaluation in the original and subsequent Jacobs affidavits. Rule 26(b)(3) absolutely entitles deponent to the verbatim transcript of his own statements either by request or by court order. In view of the large number of statements and interviews taken, which was acknowledged by Jacobs in his affidavit, there would be undue hardship in requiring each stockholder to requisition his own statement when the same relief could be obtained at once through this application. The purpose, of seeking discovery through examination of the named attorneys of the plaintiff Commission, is to obtain the "identity and location of persons having knowledge of any discoverable matter", also as specified in Rule 26. These would include persons whose names and identities have not been heretofore disclosed.

The Jacobs affidavit and plaintiff's memorandum of law argue that the attempted discovery is designed to "annoy, harrass, burden and oppress" them, and that it is "unnecessary" and unreasonable", because it would occupy their time to the detriment of other Commission work. Thus, the plaintiff relies on statutary phrases of Rule 26(c) to avoid their obligations under that very statute.

Indeed, it was the noticed attorneys who conducted the preliminary investigation and initiated the actions which led to false charges against the defendants, thereby rendering the present discovery necessary. It is these attorneys who are familiar with the summoned documents, who conducted the interviews of witnesses and who prepared the internal reports

and memoranda which stimulated the Commission actions. They are the precise persons who can comment on the sources of complaint, the content of the interviews, and their own actions in sifting and collecting evidence which underly their obstinate permistence in prosecuting this action. Defendants do not seek to obtain the "mental impressions, conclusions, opinions, or legal the ries" of Messrs Jacobs, Beirne or Nortman, which was the principle that underlied Heckman v. Taylor. It must be remembered that these attorneys were also assigned as Internal, Commission investigators. Their work product is sought with good cause by defendants, and their trial preparation material is relevant to defendants deposition and is not privileged. These attorneys leveled charges, in part, based on an evaluation of the corporation's assets including its patents and tooling, and, in part, based on their interpretation of the patent law. Are not defendants entitled to ascertain whether or not they sought the opinion of experts, either employed by the Commission or working independently outside the agency, and whether or not these experts, if any, will testify at the trial? The reported decisions seem to support this. Schlagenhauf v. Holden 379 US 104, 117-118, Southern Ry v. Lanham 403 F2d 119, 127-131. Defendants wish to question the noticed persons, not about their recollection of the interviews and interrogations, but of written records culled during, and as a direct result, of such occurences. In this way, defendants will become aware of the alleged factual basis for the charges, discovery has nothing to do with the mental impressions of the said attorneys.

To suggest that defendants' notice is motivated by a retaliatory attitude is merely a reflection of Jacobs own behavior. This case has

lain dormant for many months in the Commission files after a portion of it was dismissed by the Court and the dismissal consented to by the Commission upon prodding of their Washington, D.C. office. Suddenly, in May, 1974 the Commission revived the litigation my noticing depositions against Messrs. Tserpes, Martos and Hamos. The named defendants did not scream and cry "foul", or that they were "harassed or oppressed", but instead complied with the notice and appeared at the Commission office producing all of the requested documents, which were copied by the plaintiff, interrupting busy business schedules to do so.

Mr. Jacobs expresses discontent over the fallure of the parties to agree on a stipulation settling the action. That inability was caused by an impasse over principle. Defendants were willing to stipulate to dismissal of the charges without further ado, but the Commission insisted on inserting recitals which had the affect of reaffirming their charges. Acceptance of such conditions is entirely inconsistent with the factual record. Are the Commission lawyers to be given special treatment and granted exemption from the discovery rules merely because they were unable to pressure the defendants into an untrue and unfair stipulation of settlement? Actually, it is the failing of the Commission attorneys to get the defendants to admit to a series of stipulated lies, that is at the core of reactivation of the litigation herein. Of what relevance is it to the issues that defendants consulted with various lawyers during the course of these proceedings? They were merely exercising a constitutional right just as the individual defendants may constitutionally appear pro se. Further, it is misleading for the Commission to characterise their work as "earnest" and involving "substantial time", so as to infer that the "fruitless discussions" of settlement were due to defendants' "disruptive pattern of behavior" and "obstreperous conduct". Defendants have always acted in good faith, but are unwilling to sign a stipulation that compels them to desist from conduct they never engaged in. If retaliation is motivating force, the culpable party is the plaintiff.

4. Plaintiff's motion pursuant to Rule 37(d) presupposes that defendant Tserpes failed to appear for his deposition, or so conducted himself as to constitute behavior tantamount to a refusal to submit to examination. Those assumptions are totally without foundation.

Taerpes appeared at the appointed place, date and time, punctually, possessing the voluminous documents requested in plaintiff's notice. That notice dated May 9, 1974 was issued under the title of Mr. Moran, the Regional Administrator. Deponent asked for Mr. Moran to be present to receive delivery of the documents and sign for them. Mr. Jacobs delayed obtaining Mr. Moran's signature for a period of one hour. When he returned, with the receipt it contained no reference to the number of pages received, a total of 231. When deponent asked that this be shown, Jacobs became hostile and angry. The ensuing dispute, which lasted for one half hour, was transcribed by the reporter. Then, Jacobs directed the reporter to strike out the colloquy from the record, to which deponent objected and refused to be sworn so long as Jacobs manipulated the stenographer. Deponent insisted that everthing said be placed in the record and Jacobs threatened to evict deponent to the deposition.

It is interesting to note that at no time did Jacobs request or neek a court ruling on the propriety and meritoriousness of his and deponent's respective positions.

Jacobs further complains that deponent acted wilfully in preventing a complete examination of the other defendants, Martos and Hamos, by continually interrupting during the questioning. He alludes to various pages in the transcript to substantiate his claim. It is significant that the plaintiff has not furnished deponent with a copy of these pages although their content is material, relevant and vital to deponent's defense against these claims. The practice of withholding material documents

is consistent with the Commissionspolicy in this case. In the interest of intraess and justice, plaintiff should have furnished copies of the referred pages in advance of the return date of the motion.

Deponent suggest that for the sake of avoiding disputes, all depositions be held at the court where an immediate ruling is available on a contested issue or point.

5. Defendants seek affirmative relief pursuant to Rule 30(b)(4). It is requested that the depositions of all parties be recorded by tape transcription, that defendants furnish the tapes in duplicate and provide one of the tapes to the plaintiff immediately upon the conclusion of the deposition. This can be accomplished simultaneously with the stenographic transcription employed by the plaintiff's attorney thereby preventing anyone from controlling the actions of the stenographer without a clear and independent account of what is transpiring.

6. Defendants seek additional affirmative relief pursuant to
Rule 30(d). It is urged that plaintiff's examination of the defendants
be confined to matters within their personal knowledge, and that plaintiff's
attorneys not be permitted to inject suggestive inferences into the questions.
For example, defendants Marton and Pamon have personal knowledge of their
dealings with each other, with Theorems, and with specific stockholders.
However, they have no knowledge of either the technology or marketing
phases of the business and have so conceded. Revertheless, the questioning
of these defendants by the Commission's counsel consistently treads into
these areas where they are unfamiliar. Indeed, the questioning had an
intimidating and coercive ring to it. All of the critical facts regarding
technology and marketing are, however, known to deponent alone, except
insofar as that information was imparted to other officers and stockholders
by him, and through written documents, all of which are in the possession
of the Commission.

7. The only matter remaining to be litigated is whether the defendants engaged in acts which violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. It would appear that since the Commission possessed all of the documents requested in their notice of deposition dated May 9, 1974, which predated the commencement of this action, their only purpose in asking for those documents, which postdate this action, is presumably to ascertain if they contain evidence that will retroactively support the commission charges. Since the Commission memorandum speaks about the defendants' "ploys", one can only deduce that they make such charges to disguise their own fishing expedition.

It is to help ascertain whether or not there is any substantive basis for the charges, on the specific issues raised by the pleadings, that the depositions of Messrs. Jacobs, Beirne and Nortman are sought.

WHEREFORE, it is respectfully requested that the plaintiffs application for a protective order be denied, that their motion to strike the answers of the defendants and enter a default judgement against them, be denied, and that the relief prayed for by the defendants pursuant to Rule 30(b)(4) and (d) be granted, and that the court grant any other and further relief deemed necessary and proper.

Konstantinos M. TSERPES

Sworn to before me this

20 day of June, 1974

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ONLY COPY AVAILABLE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION :

Plaintiff, :

- against -

72 C1v11 3513 (SJR)

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES BAGIL MARTOS

ATHAN HAMOS

Defendants,

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S AFFIDAVIT OPPOSING PLAINTIFF'S MOTION PURSUANT TO RULES 26(c) and 37(d) FRCP AND SEEKING RELIEF PURSUANT TO RULES 30(b)(4) & (d) FRCP

Respectfully submitted,

KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS
Defendants Pro Se
333 West 39 Street
New York, N. Y. 10018
Tel. No.: (212)947-1460

DATED: New York, H. Y. June 20, 1974

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff.

- against -

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS

Defendants

72 Civil 3513 (SJR)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S AFFIDAVIT OPPOSING PLAINTIFF'S MOTION PURSUANT TO RULE 26(c) and 37(d) FRCP AND SEEKING RELIEF PURSUANT TO RULE 30(b)(4) & (d), FRCP

PRELIMINARY STATEMENT

This Memorandum is submitted by the defendants in support of their affidavit, which 1)opposes the motion for a protective order to excuse William Nortman, Thomas R. Beirne and Mark N. Jacobs from giving their deposition to the defendants, and further opposes the plaintiff's motion to strike the answers of Research Automation Corporation and Konstantinos M. Tserpes and to enter a default judgement against them, made pursuant to Rules 26(c) and 37(d) respectively; and 2) requests affirmative relief in the grant of permission to tape record the depositions and to limit the examination of defendants to relevant matter within their knowledge and competence.

ARGUMENT

POINT I

DEFENDANTS SHOW GOOD CAUSE AND SUBSTANTIAL NEED FOR TAKING THE DEPOSITION OF ATTORNEYS NORTMAN, BEIRNE, AND JACOBS

Rule 26(b) (3) of the Federal Rules of Civil Procedure entitles a party seeking discovery to obtain materials prepared by a party or the attorney for the party where there is a "substantial need in the preparation of the case" and the discovering party is "unable without undue hardship to obtain the substantial equivalent by other means".

Excluded from discovery by the subsection are "mental impressions, conclusions, opinions or legal theories" of the attorney.

Hickman v. Taylor 329 U.S. 495, which is strongly urged upon the court by plaintiff, stands for liberal discovery, not restrictiveness. It offers only a qualified limited immunity to broad discovery in cases where the discovering party does not show good cause, relevance and lack of privilege. Connecticut Mut. Life Insurance Co. v. Shields 17 FRD 273, Bell v. Commercial Insurance Co. 280 F2d 514.517, Lauer v. Tankrederi 39 FRD 334. Hickman also excludes from discovery the true "work product" performed by a lawyer which would tend to infringe on the profession's function in a lawsuit. In particular, that "work product" dealt with memorandum used to recollect the details of oral interviews and was related to the Rule 26 (b) (3) exclusion proscribing discovery of "mental impressions" etc.

Nevertheless, the discovering party's right to evaluate material is not unequocally beyond the scope of discovery. So. Ry. v. Lanham 403 F2d 119, Pickett v. L.R. Ryan, Inc. 237 F. Supp. 198 Witness' statements taken by the opposing party's investigator can be discovered if the lapse of time has effected the witnesses' memory Tannanbaum v. Walker 16 FRD 570 or caused his present recollection to deviate from the prior statement. Hauger v. Chicago R.I. & Pac. R.R. 216 F2d 501.

Defendants seek to examine the noticed attorneys for concrete reasons. The said attorneys served a dual role for the plaintiff. They were investigators who evaluated data, and then became attorneys who prosecuted the charges. By their own admission they acted on an outside complaint. They have not disclosed the source of the complaint, to date, and only a deposition will reveal the name of a key potential witness who may possess exculpatory information beneficial to the defendants. In addition, Jacobs stated, in his original affidavit supporting an application for an injunction, that plaintiff's attorneys interviewed 9 stockholders, received 83 stockholder replies to commission questionnaires, and talked to some (no number mentioned) stockholders by telephone. He also concluded that defendants sold stock to shareholders in the following numbers, Marton - 25, Hamos - 20, Tserpes - 10. Taking the depositions of the noticed attorneys will enable defendants to obtain evidence which goes to the heart of the charges concerning alleged fraud and misrepresentation. Their answers will reveal the names of persons with material information, the existence of documents and data dealing

with the issue of patent rights, asset evaluation, and the plaintiff's alleged basis for legal conclusions. Defendants have no comparable or substantial alternative means of securing this information without first getting the names of those persons interviewed, transcripts of their statements, and factual accounts of interviews, as distinguished from the mere impressions or opinions of counsel. Thus, their depositions are necessary, relevant, not privileged and good cause exists for defendants request, Guiford National Bank v. So. Ry 297 F2d 921, Schlagenhauf v. Holder 379 U.S. 104, Mitchell v. Bass 252 F2D 513, Burke v. U.S. 32 F.R.D. 213.

POINT II

TSERPES WILLINGLY APPEARED FOR DEPOSITION AND DID NOT WILFULLY REFUSE TO BE SWORN

Rule 37(d) specifically limits court sanctions to a case where
the party served with a proper notice fails to appear. Gill v. Stolow
240 F2d 669, Saltzman v. Birrell 156 F. Supp 538. Further, the
courts have clearly held that there will be no dismissal or
default judgment imposed where the party or counsel is unfamiliar
with federal procedure. Dunn v. Pa. R. R. 96 F. Supp 597, Mauer-Neuer,
Inc. v. United Fackinghouse Workers 26 FRD 139. Rule 37(d) sanctions
are only used when there is total non-compliance with the obligation to
submit to discovery. Scarlatos v. Kulakundis 21 FRD 185. This is not
the case here.

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Defendant Konstantinos M. Tserpes not only appeared willingly, but produced all of the requested documents and was prepared to be sworn and submit to oral examination. It was due to the refusal of Mr. Jacobs to conduct an open, fully transcripted deposition that led to the dispute which culminated in Jacobs terminating the proceeding. In addition, Jacobs continued to fulminate against Tserpes and badger him and others associated with defendants. The fact is incontrovertible, that Tserpes did not wilfully refuse to be sworn.

CONCLUSION

Based on the aforesaid argument, it is respectfully urged that the Court direct Messrs. Nortman, Beirne and Jacobs to submit to oral depositions, and that the application of plaintiff to strike the answer of defendant Corporation and Tserpes, and to enter default judgment against them, be denied.

Respectfully submitted.

KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS
Defendants Pro Se
333 West 39 Street
New York, N. Y. 10018
Telephone No. (212)947-1460

Dated: New York, N. Y. June 20, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

against -

RESEARCH AUTOMATION CORPORATION
BASIL MARTOS

ATHAN HAMOS

Defendants,

DEFENDANTS STATEMENT IN SUPPORT OF CROSS MOTION TO COMPEL DISCOVERY PURSUANT TO RULE 37 OF THE FRCP

Respectfully submitted,

KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHEN HAMOS
DEFENDANTS PRO SE
333 West 39 Street
New York, N.Y. 10018
Telephone No.: (212)947-1460

DATED: New York, New York June 20, 1974 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff.

- ngainst -

ATHAN HAMOS

RESEARCH AUTOMATION CORPORATION KONSTANTINGS M. TSERPES BASIL MARTOS

Defendants

Defendants, Konstantinos M. Tserpes, Basil Martos and Athan Hamos, hereby move, pursuant to Rule 37 of the Federal Rule of Civil Procedure, for an order compelling the plaintiff to produce all of the documents specified in their notice of discovery dated May 29, 1974.

- 1. The plaintiff, in a paper entitled "Plaintiff's Response to Defendants Request for Documents" dated June 14, 1974 indicated that some of the requested documents will be produced and that the others are not subject to discovery on the ground of privilege based on "work product". Further, the plaintiff requires defendants to pay for and/or order some of the documents from reporting service previously employed by the plaintiff.
- 2. It is respectfully submitted that it is the duty of the party under discovery to produce all documents, records, and papers which are properly subject to discovery, and not to hide behind third party agreements (Rule 26). As for the expense of reproduction, it is noted that defendants reproduced all copies of over 200 pages of papers sought by plaintiff in its discovery endeavor dated May 9, 1974, and in the interest of fairness and justice,

It believes plaintiff bear that expense. However, if plaintiff adopts the petty stand of haransing the defendants by requiring that defendants pay for reproduction of documents, they will do so as a magnaminous genture.

- 3. Plaintiff Indicates that there are two Commission files (24 NY 7584) one dealing with the Regulation A Offering of Research Automation Corporation and the other with correspondence between plaintiff and R.A.C. Then, plaintiff proceeds to refuse to offer the only relevant file in its possession, that dealing with the investigation which is the subject of litigation. The latter file is the only germane file, and it is the records contained therein, which presumably form the basis for the plaintiff's charges of fraud and misrepresentation, that defendants insist on inspecting. Plaintiff should have no reason to hide the truth and take refuge behind the blanket claim that the matter is privileged.
- 4. Although plaintiff agrees to furnish transcripts of statements from various persons including non-party officers, directors and employees of R.A.C. they object to supplying Jacobs' reports or memorands on the ground that they are his work product, and therefore privileged. Defendants have answered this contention in their Memorandum of Law dated June 20, 1974, addressed to an application by three of plaintiff's attorneys for a protective order. Defendants have argued that they are not seeking the

mental impressions, opinions, conclusions or legal theories of the attorneys, but only the materials substantially necessary for their trial preparation as authorized by Rule 26(b)(3). These include relevant facts and evidence contained in that investigative file including the names of witnesses, and other exculpatory data. Surely, the court can effictively screen the real "work product" meaning the lawyers opinions and reasoning, from the evidentiary matter which is not privileged.

It is apparent from plaintiff's argument that all of the interviews with stockholders, which four the basis of the basis for the plaintiff's charges in this litigation, were oral and not transcribed or recorded, and that it is only the hearsay accounts made by plaintiff's personnel that consitutes the substantive basis for the underlying charges. Defendants are entitled to copies of any other statements or writings offered to the plaintiff by these same interviews which differ, or are inconsistent with these investigative hearsay accounts. To deny this request would be a manifest injustice as it would deprive defendants of relevant and necessary exculpatory material, and uncover the plans perpetrated by plaintiff's personnel.

WHEREFORE, defendants respectfully urge the Court to compel the plaintiff to physically produce all of the documents and papers requested in the Notice of Deposition dated May 29, 1974, without

qualification, and that the cost of reproduction be borne by the plaintiff.

Respectfully submitted,

KONSTANTINOS M. TSERIES
BASIL MARTOS
ATHAN HAMOS
Defendants Pro Se
333 West 39 Street
New York, N. Y. 10013
Telephone No. (212)947-1460

Dated: New York, N.Y. June 20, 1974

480

UNITED STATES DISTRICT COURT SOUTHERN DESTRICT OF HER YOLK

SECURITIES AND EXCHANGE COMMISSION:

PLAINTIFF,:

- against - : 72 Civil 3513 (SJR)

PESEARCH AUTOMATION CORPORATION

KONSTANTINOS M. TSERPES

BASTL MARTOS ATHAN HAMOS NOTICE OF MOTION

: AN APPLICATION FOR LEAVE OF COURT TO S RVE

DEFENDANTS, : OF AMERICA, PURSUANT TO RULES 13(b) and (c)

and 14(a) OF THE FRCP

PLEASE TAKE NOTICE that upon the affidavit of

KONSTANTINOS M. TSEPPES sworn to on June 24, 1974, the proposed affidavit of claims of Konstantinos M. Teerpes, Basil Marros and Athan Hamos and annexed exhibit, the proposed third party complaint and upon all other papers and proceedings had herein, the undersigned will move this CCURT in Room 610 of the U.S. District Court House, Foley Square, New York, New York on July 10, 1974 at 2:00 P.M. or. as soon thereafter as counsel can be heard, pursuant to Rules 13 (b) and (d) and Rule 14 (a) of the Federal Rules of Civil Procedure, for leave to serve a third party complaint against the United States of America.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c)(1) of the General Rules of this Court, you are required to serve all opposing affidavits and answering memoranda on the undersigned no later than noon of the day preceding the return date.

Respectfully submitted,

Dated: New York, N.Y.
June 24,1974

24,1974 Konstantis & Myore

KONSTANTINOS H. TSEPPES BASIL MARTOS ATHAN HA 10S Defendance Pro Se, 333 West 39 Street

New York, N. Y. 10018

Telephone: 012)947-1460

WILLIAM R. MORAN, REGIONAL ADMINISTRATOR SECONDSTORE AND EXCHANGE COMMISSION 26 Federal Plaza New York, N.Y., 10007

-49

SECURITIES AND EXCHANGE COMMISSION

: 72 Civil 3513 (SJR)

Plaintiff.

- against -

A F F I D A F IT

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS

Defendants,

KONSTANTINOS M. TSERPES, being duly sworn, deposes and says:

- 1. He is President of defendant Research Automation Corporation and an individual defendant in the prime action for injunction brought by the Securities and Exchange Commission, an agency of the United States of America.
- 2. He makes this affidavit in support of a motion pursuant to Rules 13(b) and (d) and Rule 14 (a) of the Federal Rules of Civil Procedure for leave to serve a third party complaint against the United States of America.
- 3. The claim against the United States of America arises out of the transaction and occurence that is the subject matter of the claim in the prime action, to wit, the issue of deliberate and malicious false accusations against the third party plaintiff by the Securities and Exchange Commission, as an agent of the United States of America.
- 4. Although the proposed claim is termed a third party action because it names the United States of America as a party, it could properly be designated a counterclaim since the SEC is an agency of the United States of America.

5. The provision of 28 USC 2672 and 2675, relative to claims procedure prior to bringing of an action do not apply to this. situation which is governed by the last sentence of 28 USC 2675 (a) as to notice and 2675 (b) as to amount.

6. The basis of the third party complaint is set forth in detail in the annexed proposed complaint, proposed affilavit of claim, and proposed exhibit attached thereto. In essence, it contends that the SEC deliberately and with malice aforethought, defamed defendant Konstantinos M. Tserpes, violated his civil rights, and injured the three individual defendants Konstantinos M. Tserpes, BAsil Martos and Athan Hamos by its actions in prosecuting the injunction complaint knowing there was no substance to their charges of anti-fraud violations and that such charges were fictitious

7. That no previous application for the relief herein requested has been made.

KONSTANTINOS M. TSERIES KONSTANTINOS

Sworn to before me this

1 day of June 1974

Cyra, B. house

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff.

- against. -

RESEARCH AUTOMATION CORPORATION
KONSTANTINGS M. TSERPES
BASIL MARTOS
ATHAN HAMOS

Defendants,

KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS

Third Party Plaintiffs,

- against -

THE UNITED DEATES OF AMERICA

Third Party Defendant,

72 Civil 3513 (SJR)

PROPOSED
THIRD PARTY
COMPLAINT

Third Party Plaintiffs Konstantinos M. Tserpes, Basil Martos, and Athan Hamos for a first count of this third party complaint, alleges:

- 1. The action arises under the 5th and 14th Amendments to the Constitution of the United States; Civil Rights Act, 42 USC 1983, Federal Tort Claims Act, 28 USC 1346 (b); Securities Act of 1933, 15 USC 77c(b); and Administrative Procedure Act, 5 USC 702, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.
- 2. That at all the times herein mentioned, third party defendant
 The United States of America (hereinafter called the "United States")
 was and still is a sovereign power.
- 3. That the Securities and Exchange Commission (hereinafter called "the Commission") was at all times herein mentioned an agency of the third party defendant, the United States of America.

4. Research Automation Corporation (hereinafter called "the Corporation") is now and was at all times mentioned, a New York Corporation, engaged in the development, production and sale of automatic machines.

5. Third party plaintiff Konstantinos M. Tserpes (hereinafter called "Tserpes") resides in the Southern District of New York at 510 9th Avenue, New York, N.Y.

6. Prior to the 10th day of March 1972 "Teerpes" invented among numerous other devices, a machine known as an automatic loading, transfer and packaging unit and acquired patent rights thereto.

7. On or about the 3rd day of February 1965, "Tserpes"

licensed his patent rights in and to the automatic loading, transfer and packaging unit to the "Corporation", which was organized and chartered in New York on the 2nd day of February, 1965.

8. At all times herein mentioned, third party plaintiff "Tserpes" was and still is the controlling stockholder of the "Corporation".

9. On or about the 10th day of March 1972, Tserpes on behalf of the "Corporation" filed a Notification, Offering Circular and related exhibits with the "Commission" for an exemption from public registration of a \$456,000 public stock insue, pursuant to Section 3(b) of the Securition Act of 1933 (15 USC 77c(b), popularly known as the Regulation A exemption.

10. The preparation and filing of the Regulation A exemption was done in accordance with the applicable rules of the "Commission", and

in a regular and proper manner.

11. On or about the 27th day of April 27, 1972 the "Commission" initiated an investigation into the operation of the "Corporation", interviewed and interrogated "Therpen" and the other defendant officers of the "Corporation", and conducted an inquiry into the circumstances of prior stock cales to individual, private stockholders of the "Corporation".

IP. During the interviews and interrogations of the private stockholders, mostly Greek born with limited capacity to speak and understand English, no interpreters were provided by the "Commission" thereby severly handicapping and restricting the communication between the interviewed persons and the "Commission" personnel, and impairing the ability of the latter to ascertain the entire truth and all relevant and material facts.

"13. As part of its investigation, several "Commission" attorneys visited the "Corporation" premises to inspect its operations and to obtain samples of its literature and correspondence.

14. At all times, "Tserpes" and the officers, directors, and stock-holders of the "Corporation" fully cooperated with the "Commission" and its staff.

notice of, or opportunity afforded to comply with "Commission objections, by means authorized by the Rules, ic., granting leave to amend any item deemed questionable or unclear, the "Commission" advised the defendants that the filing for a Regulation A exemption was in an inactive status and requested that it be withdrawn.

16. The aforesaid advise of the "Commission" was tantamount to a suspension of the "Corporation"s Regulation A Filing.

17. Thereafter, the "Commission unreasonably and arbitrarily delayed the efforts of the defendants to comply with the securities statutes and rules, and the "Commission" through its "agents, servants and employees" acted out whim and caprice in thwarting the "Corporation's" right to exemption.

18. The "Commission" through its "agents, servants and employees" knew at all time that not a single ground specified in Rule 261 (a) existed to justify the de facto suspension of the "Corporation's" filing.

19. The "Commission's" action were a denial of property
without due process of law or the equal protection of the laws and
in violation of the 5th and 14th Amendments of the Constitution of the
United States.

20. The third party defendant's actions were in contravention of Section 9(b) of the Administrative Procedure Act, 5 USC 702) in that it exceeded the statutory power and discretion delegated by Section 3(b) of the Securities Act of 1933 (15 USC 77c(b) and Bulen 251 through 262 promulgated thereunder.

"Commission" instituted the action herein for a permanent injunction, made a motion for a temporary injunction, and simultaneously obtained a temporary stay pending the hearing of the motion against the defendants because of alleged violations of Section 5(a), 5(c) and 17(c) of the Securities Act of 1933 (15 USC 77e(a), 15 USC 77e(c), 15 USC 77q(a), and Section 10(b) of the Securities Exchange Act of 1934 (15 USC 78J(b), and Rule 10b-5 there-under (17 CFR 240,10b-5).

22. The aforementioned automatic unloading, transfer and packaging unit was awarded an Industrial Research award on September 21, 1972 adjudged by a team of selected from among the world's outstanding scientists to be one of the year's 100 best products for uniqueness, importance and usefulness.

27.0n or about the 18th day of October 1972, in answer and opposition to the "Commission"s" motion for temporary injunction, defendants produced documentary proof in contradiction of each and every charge and complaint made by the "Commission" through its "agents, servants, and employees" relative to 1) the private placement exemption sale of stock to individual friends and relatives of the individual defendants, 2) patent rights of third party plaintiff "Tserpes" and the "Corporation" in the automatic unloading, transfer and packaging unit, 3) production costs of the unassembled units stored at the "Corporation's" plant, 4) the value of the patent rights for the automatic unloading, transfer and packaging unit, 5) the absence of any stock offers or sales by use of mail, telephone, telegraph or other prescribed medium, 6) full disclosure of material facts about the defendants,

24. On the 8th day of November 1972, this Gourt (Ryan, J.) issued a temporary restraining order against the defendants without considering or taking into account the papers submitted by the defendants on October 18,1972 in opposition of the motion to the "Commission".

25. The defendants appealed from the order of this court to the Second Circuit Court of Appeals.

26. In December 1972, the "Corporation" was the beneficiary of an international market survey prepared by a project team from the Graduate

School of Business Administration of Rutgers University collaborating
in a program sponsored by the Bureau of International Commerce, United
States Department of Commerce, attesting to the world-wide interest and need
for the machine.

27. On or about the 13th day of February 1973, the "Commission" moved to withdraw the part of the complaint relating to alleged violations of Section 5(a) and 5(c) of the Securities Act of 1933 (15 USC 77e(a).

15 USC 77e(a) and requested that the Circuit Court of Appeals remand the action to this Court for further proceedings, including an evidentiary hearing, if deemed appropriate by this court, to prepare findings of fact and conclusion of law.

28, Owing to the capricious and deliberate refusal of the "Commission", through its "agents, servants and employees" to unfreeze their Regulation A filing, third party plaintiffs were compelled on or about the 25th day of February 1973, to obtain private financing in order to continue operations and inaugurate full scale production of the automatic unloading, transfer and packaging unit.

29. On or about the 9th day of March 1973, the Second Direuit Court of Appeals (Docket No. 73-1022) remanded the action to this court with authority to act as it finds warranted under the circumstances.

30. Thereafter, "Tserpes" after exchanges with and at the invitation of the office of the "Commission's" General Counsel, sought to reach a fair and honest settlement with the office of the "Commission's" New York regional counsel in order to prevent further costly delay in the processing of the Regulation A filing.

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31. The "dommination" through its "agents, servants and employees" refused to alear the "Corporation's" filing unless and until defendants, by stipulation inferentially conceded that it had committed violations of the anti-fraud provision of the Securities Act and Rules, even though it knew that no such violation were committed or existed.

32. The "Commission" through its "agents, servants and employees" insisted on the insinuation of fraud and promedoing by the defendants in order to save its own "face" and immunize itself from civil liability.

33. The actions of the "Commission" through its "agents, servants and employees" in blocking the "Corporation's" right to a Regulation A exemption have no substantive basis, and the charges of anti-fraud violations are a sham and known to be such by the "Commission" third party defendant.

34. That no stockholder of the "Corporation" made a complaint about their investment in the "Corporation" stock, asked to rescind the stock sale, or brought a civil action against the defendants under the applicable provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, notwithstanding the innuendo and inferences to pursue that course suggested by the undisguised attacks by the "Commission".

35. On the 23rd day of October 1973, this "Court" issued an order vacating the temporary injunction dated November 8, 1972 and dismissed all parts of the complaint in the action for a permanent injunction which alleged violation of Section 5 of the Securities Act of 1933.

36, With full knowledge of all of the facts recited in the aforesaid paragraph 20 through 34 inclusive, the "Commission" through its "agents, servants, and employees" nevertheless continued to usurp its statutory authority as provided in the statute and rules and did stalemate defendant's

offorts to main the Magnilation A exemption sought on March 10, 1972 with omplete realization that its actions neverly damaged the economic and financial interests of the third party plaintiffs and caused the third party plaintiffs extreme loss, cost and expenses.

37. The "Commission" third party defendant's baseless charges of anti-fraud violations persist to this date and are known to to be without substance and grounded on a tissue of fabrications and imaginary facts wilfully concected, through its "agents, servants and employees" to impede the industrial and financial progress of the "Corporation".

By reason of the premises, third party plaintiffs have been jointly damaged in the sum of \$6,400,000.

Third party plaintiff Konstantinos M. Tserpes, for a second count of the third party complaint, alleges;

in this third party complaint marked and number 1 through 37 inclusive, with the same force and effect as though fully set forth at length herein.

39. Prior to the 10th day of March 1972, "Tserpes" was the holder of 23 patents to unique and original mechanical contrivances and enjoyed an impecsable worldwide reputation as an engineer, inventor and industrialist and for integrity, honesty and truthfulness as an individual.

40. Due to the action of the "Commission" through its "agents, servants and employees", "Tserpes" reputation has been smeared, his name defamed, and libeled, and he has been a victim of calumny, ridicule and obliquy, visited upon him by the charges of anti-fraud violations, deception and misrepresentation, all of which were and without foundation, and known to the "Commission" third party defendant to be baseless.

has been damaged in the sum of \$900,000.

Third party plaintiff Fonstantinos M. Tserpes, for a third count of the third party complaint, alleges:

#1."Therpen" repeates and realleges each and every allegation contained in this third party complaint marked and numbered 1 through 40 inclusive, with the same force and effect as though fully set forth at length herein.

42. The "Commission" through its "agents, servants and employees" conspired to deprive "Tserpes" of his rights, privileges and immunities secured by the Constitution of the United States and the Civil Rights Laws in violation of Title 42 USC 1983.

43. The "agents, servants and employees" of the "Commission" did make disparaging comments about "Tserpes" Greek origin, and did cost aspersions upon the capacity and intelligence of Greek immigrants to understand matters of normal, daily activities.

44. The suspension of the "Corporation's" Regulation A filing was induced by discriminatory behavior of the "Commission" through its agents, servants and employees toward "Tserpes" and due to the discriminatory manner in which it administered the statute and rules with respect to the "Corporation".

By reason of the premises, third party plaintiff Konstantinos M. Tserpes, has been damaged in the sum of \$400,000.

WHEREFORE, third party plaintiffs demand judgement against the third party defendants as follows:

Third party plaintiffs jointly for the sum of \$6,400,000.

Third Party plaintiff Konstantings M. Tserpes for the sum of \$1,300,000.

Together with cost and disbursements of this action.

Respectfully submitted,

KONSTANTINOS M. TSERPES

HARTL MARTOS

ATHAN / LAMOS

Defendants Pro Se
333 West 39 Street
New York, New York 10018
Telephone No.(212)947-1460

DATED: New York, N.Y. June 21, 1974

Sworn to before me this

1-1 day of June 1974.

Charles in it or York County

1 pm B. Krawse

UNITED STATES DISTRICT COURT 1 SOUTHERN DISTRICT OF HEW YORK KONSTANTINOS M. TSERPES 3 BASIL MARTOS 72 Civil 3513 (SJR) ATHAN HAMOS Claimants PROPOSED AFFIDAVITOFIC - against -6 THE UNITED STATES OF AMERICA 7 8 BASIL MARTOS, being duly sworn, deposes and says: 10 That he is the Vice President of Research Automation 11 Corporation. 12 That he read the affidavit of Konstantinos M. Tserpes sworn 13 to on the twenty-first day of June, 1974 and is in entire agreement 14 with the contents thereof and the claim therein, 15 That he joins with Konstantinos M. Tserpes in the claim 16 against the United States of America and the "agents, servants, 17 and employees of the Securities and Exchange Commission for damages 18 sustained by him due to misrepresentations, fraud and violations 19 of the Securities Act, Rules and Regulations by the Commission and 20 its "agents, servants and employees". 21 (Sail larlo 22 23 24 Sworn to before me this 25 2/ day of June 1974. 26 27 CYRUS B. KRAUSB

NOTARY PUBLIC, State of New York

Rudfield in New York County

No. 1300000

C. Blandich New York Co. C.F. of D. 28 29 Commission Expuser March 50, 1900 76 30 31

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK KONSTANTINOS M. TSERPES BASIL MARTOS 72 Civil 3513 (SJR) ATHAN HAMOS Propused Claimants. AFFIDAVIT 5 - against -6 The United States of America 8 ATHAN HAMOS, being duly sworn, deposes and says: That he is Vice President of Pescarch Automation 10 Corporation. 11 12 That he has read the affidavit of Konstantinos M. Tserpes, 13 sworm to the twenty-first day of June 1974 and is in entire 14 agreement with the contents thereof and the claim therein. 15 That he joins with Konstantinos M. Tserpes in the claim therein-16 against the United States of America, the "agents, servants and employees". 18 of the Securities and Exchange Commission for damages sustained by 19 him due to misrepresentation, fraud, and violations of the Securities 20 Act, Mules and Megulations, by the Commission and its "agents, servents 21 22 and employees". see ferm 23 24 25 26 Sworn to before me this 27 2/ day of June 1974. 28 29 30 NOTARY PUBLIC, State of New York
Qualified in New York County CYRUS B. KRAUSB 31 No. 2-7369000 32 niesion Expires March 30, 1989 76

KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS

72 Civil 3513 (SJR)

PROPOSED OF CLA

Claimants,

- against -

THE UNITED STATES OF AMERICA

KONSTANTINOS M. TSERPES, being duly sworn, deposes and says:

1. He is President of Research Automation Corporation (Corporation).

2. He submits this affidavit in support of the claims against the United States of America, and the "agents, servants and employees of the Securities and Exchange Commission (Commission) for damages sustained by him due to misrepresentations, fraud and violations of the Securities Act, Rules and Regulations by the Commission and its "agents, servants and employees".

3. The actions of the Commission and its agents, servants and employees were in contravention of deponent's civil rights, defamed his reputation and caused economic injury to deponent, as its principal stockholder.

4. The wrongful acts of the Commission and its "agents, servants, and employees consisted in charging deponent and other officers of the Corporation with perpetrating fraud and other deceitions on the Corporation's stockholders, knowing that such charges were false and untrue and continuing such charges in the face of clear proof of such falsity; in conducting an investigation without providing deponent or interviewed stockholders with a qualified interpreter in violation of the due process of law, in preventing the Corporation from proceeding with

ONLY COPY AVAILABLE

sale of stock under Regulation A exemption by placing the "Notification" and "Offering Circular"in an inactive status contrary to the Commission Rules; and in making false accusations in the presence of others, relative to interstate stock sales and communications that were outlawed by the Securities Act. Specifically, the false charges knowingly perpetrated by the Commission and its "agents, servants and employees" were that; A) Stockholders did not sign letters of investment intent. B)Stockholders were not shown Corporation financial statements or other matter listed in the offering circular, O) The Corporation misrepresented its patent claims to the Automatic Unloading, Transfer and Packaging Unit, D)Stockholders were not told nor did they know of repayment of officers loans from subscription proceeds. E) The Corporation carried false values on their balance sheet for patents, a working unit and six partially completed Automatic Unloading, Transfer and Packaging Units, 6) The Commission was provided with A) Copies of the Stockholders! letter of intent, B) Their statement of satisfaction with the Company's progress and operation, C) Affidavits as to their closeness to the principals of the Corporation by blood relationship or long friendship, D) Proof of patent rights, and E) Evidence of the development costs of the working unit and six unfinished machines; but in spite of this evidence the false accusations continued without any effort made by the Commission to evaluate the truth or to obtain corrective changes, if required, as in the usual Regulation A filing. ? . The false accusations damaged deponent's name in the eyes of the stockholders, suppliers and purchase prospects of the Corporation.

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8. During the hearing before the Commission, discriminatory ethnic references and insuations were made concerning the "unsophisticated" capacity of "illiterate Greek immigrants", in violation of the Civil " rights of deponent and other stockholders.

9. Prior to the action of the Commission, deponent had an impeccable reputation for veracity, honesty and integrity, was awarded international prizes for character and humanitarian achievements, received over 20 patents for highly sophisticated inventions, and held engineering and other specialized degrees and recognition in his profession. The action of the Commission interfered with deponent's pursuit of additional awards for contributions and achievements and held him up to ridicule in his profession. The compensation value of these awards is \$900,000.

10.Due to the actions of the Commission and its employees, deponent and the Corporation lost over 1-1/2 years in obtaining alternate finance ing to continue development of the highly necessary Automatic Leading Units. This alternate funding added approximately \$1,150,000. to-the Company 's cost of operations for interest, bonuses, options and in other expenses connected with it, and the loss of profits including increased operating costs due to material shortages during this period WAS \$3,100,000.

Further, the timed consumed in federal agency and court proceedings detracted from development work, by the deponent, on inventions to which deponent has patents and/or patent rights. The value of the , of which \$ 887,500 is portion represents loss is \$1,250,000 compensation to which deponent would be entitled.

11. In total the claims of the deponent amounts to \$6,430,000.

KONSTANTINOS M. TEERPES

Swom to before me this

day of June 1974.

OTARY PUBLIC, State of New York nalified in New York County Cert. filed with New York Co. Cik. & To Commission Expires teorob 30, 1960 76

CYRUS B. KRAUSE

PURPOSE TO PROVE THE THUTH

COMPANISON BETWEEN S.E.C. 'S AFFIDAVIT, R.A.C. 'S AFFIDAVIT AND CONCLUSION

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13. Commencing in 1970 and continuing to the present date, the defendants have offered. sold, and delivered after sald, 41,700 shares of the Common Stock of RAC to approximately 90 members of the general public for an aggregate of \$53.850.

13. The purchasers of the stock were all friends, and relatives of the defendant officers and as such were private not public stockholders. The Commission in a memorandum submitted to the Second Circuit Court of Appeals, stated that they would withdraw from the completet. charges made under Section 5 of the Securities Act of 1933.

13.From 1970 to date 41,700 shares of PAC Common stock was sold to 90 private stockholders, all friends and relatives of the individual defendants. The S.E.C. recognized this in their memorandum dated dated 243/73 and theCourt dismissed Section 5 charges on 10/23/73.

14. On may 5,1972 defendant Tserpes testified 14. The so-called unregistered stock was sold 14. Unregistered shares were sold to 9 in the Commission's New York Legional Office that he and other officers of RAD offered and sold unregistered stock to approximately 90 persons at prices ranging from \$1 to \$6 per share within the last two or three years.

to the same private friends and relatives of the individual defendants referred in "13". Since the sales were "private placement" sales, exempt under Section 4(2) of the Securities Act of 1933, they do not have to be registered.

private persons at prices between \$1 to \$3 per share over the period 1970-72, all of such shares being except under the "private placement" rule of Sec. 4(2) of the 1933 Act.

15.0n or about September 10,1971, defendant RAC caused a form letter to be mailed. apparently to all stockholders, which offered them addedonal shares at \$2

15. The stockholders referred to were the same 15. The 9/10/71 form letter to shareprivate friends and relatives of the indiv idual defendants mentioned in 13 and 14 execut from the registration require

holders, offering impediatored

16.0n May 16,1972 defendant Tserpes submitted a list of the persons who purchased RAC stock pursuant to a subpoena duces tecum issued by the staff of the Commission (see Exhibit attached hereto).

17. Approximately nine investors who had purchased RAC stock were interviewed by me and other members of the Commission's staff. The remaining approximately 33 persons who purchased NAC stock were sent questionnaires to be filled out and returned to the Commission's Office. Some persons who returned the questionnaires were contacted by me by telephone.

18. Analysis of my communications with investors revealed:

(a) defendant Martos offered, sold and

16. The list submitted by Defendant Tserpes contains the namesqof the private friends and relatives who are exempt from registration as evidenced by the Commission's own expressed intention to withdraw Section 5 charges as set forth in memorandum to the Second Circuit Court of Appeals dated February 13, 1973.

15. The 5/16/72 list of shareholders contains the names of shareholders who, under the "private placement" rule, purchased stock that was exempt from registration.

17. The stockholders, who were interviewed by 17. The nine interviewed stockholders the Commission, were not fully apprised or informed of the purpose of the interview, did not understand the motives of the Commission were not permitted to use qualified interpreters, and were the victims of improper suggestions by the Commission staff as to themotives and actions of the defendants.

and those who returned SEC questionairres were not told the reason for the laterview or questionnaire, were not furnished with an interpreter and received improper suggestions and inferences from the SEC staff as to defendants conduct.

CONCLUSTOR

delivered after sale unregistered securities of RAC to approximately 25 persons in the New York Mity area during the time period of 1970 to the present.

friends and relatives, previously referred to, who were emempt from registration under the "private placement" exclusion

placement" stock to 25 investors in New York City from 1970-82/

(b) defendant mamos offered, seld and delivered after sales unregistered Zsecurities of RAC to approximately 20 persons in the Rochester, New York (b) liamos sales were of the same nature as :artos

(b) Hamos sold exempt "Private placement" stock to 20 persons in Rochester, New York from 1970-72.

Oarea during the time period 1970 to he present: and (c) defendant Tserpes offered, sold and

(c) leerpes sales were of the same nature as lamos and Martos.

(a) Tserpes sold exempt "Private placement" stock to 10 investors in the New York City area from 1970-72.

delivered after sale unregistered Decurities of BAC to approximately To persons during the time period 1970 to the present.

19. My investigation further revealed that the 19. All of the private stockholders, friends and relatives of the individual defendants were fully informed about the Corporation. its personnel, financial statements, products, plans, contracts, obligations and

19. The 92 investors were mostly Greek imigrants, who while illiterate is English, were fully literate in Gree and entirely sophisticated in mener ing their our mosey and totally

investors did not we a relationship with RAC which gave them access to the kind of information about the Corporation that registration would have disclosed, or

which would be included in a prospectus, or would necessarily be provided to offerees of a qualified private placement. Spedifically, almost all of the approxinately 92 investors are Greek immigrants to the United States and many are unable to read or write English. Many of them are unsophisticated in securities investments. Most had not purchased any securities prior to their investment in RAC. None had signed a letter of investment intent. None hadseen any financial statements of aAC in connection with the offer or cale of stock. In addition, the false statements and naterial omissionswhich are the subject of the following section, which were made to these investors in connection with their purchase of the stock are further evidence that these investors were not provided with the quality of

patent rights equivalent to which they would receive from a registration. In addition, the stockholders personally know the individual defendants, of their reputations and performance, and spoke the same language, fraternized and socialized with them, and were on a close and intimate basis. All had investment experience and many were canny and wise in the way of managing their money. They preferred to invest in an enterprise wherey they trust the principals as compared to one controlled by strangers. Everyone signed a letter of investment intent. Those were all submitted as Exhibit A to defendant Terres' affidevit dated October 8, 1972.

defendents who were either relatives or close friends. The investors all had total access to the information normally provided by a registration statement and all executed letters of investment intent.

information necessary to sustain a private placement exemption.

purchased unregistered RAC stock from defendants Tserpes, Martos and Hamos indicated that the defendants made untrue statements of material facts and omitted to state material facts, necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading inconnection with the offer, sale and delivery after sale of unregistered Common Stock of RAC.

21. On June 6,1972 I interviewed Mr.
Grigorios Harris (Harris") At .

the Commission's Regional New
York Office. Harris told me.

20. Mr. Jacobs interviewed private stockholders, exempt from registration, under section 4(2), as conced by the commission's memorandum Jated February 13,1973 expressing intent to withdraw from the complaint charges made pursuant to Section 5 of the Securities Act of 1933. There is no evidence that those stockholders gave evidence of anti-frand vialations by individual defendants, except for the conclusory statement of Mr. Jacobs. There is no transcript of the interviews by which an objective person could fairly evaluate their comments and answer.

21. Grigorios Harris is actually Grigorios
Haralambidis, the father of Konstantinos
G.Haralambidis.

29. There is noevidence of material misrepresentation, attributed by the "private placement" stock-holders to the individual defender except the conclusory allegations Mr. Jacobs.

21_

an Engineer by profession, with considerable

a cioce friend and fellow engineer.

500 shares of RAC stock from Teerpes

(b) That Tserpes had demonstrated the Automatic Transfer Unit to him in 1970 when Wolf bought RAC stock, and that Tserpes told him that the machine was patented.

(c) That Terpes told him that the stock was currently for sale at \$2 per share but the price would be between \$5 and \$20 share within 2 or three years.

investment experience. He is highly sophisticated in technical and financial natters, observed the Automatic Unit in operation and washighly impressed with it.

- (b) me was not told specifically that a patent was issued for the unit, only that defendants had patent rights. Bolf was familiar with Teerpes' ability as a designer, engineer and inventor, understood that there were multiple patent claims filed by Iserpes for his intricate unit of over 6000 component parts, and recognized its utility and novelty and the validity of the patent claims.
- (c) There was never any serious discussion of (c) The sales price of \$2 was discs future stock prices, and Wolf, with long investment experience was not likely to rely on "blue sky" promises or representations. His indusement for surchase was based on his observation and acquaintance with Tserpes' achievements.
- (d) He was offered the company's recerds to study and examine at his pleasure.

(b) He saw the unit de Tserpes and was impressed with its technical capabilities and aware of the patent claims and rights to a whit of over 6000 component parts.

experienced engineer and demlisticated investor on

will there was no reliance by

(d) His friendship with To

of R.A.C. stock; and

information available in a temperation statement.

- 23.On June 6,1972 I interviewed Mr. Emmanuel
 Gasparis ("Gasparis") at the Commission's
 New York Regional office. Gasparis told
 me that:
 - (a)He was offered and purchased 500 shares of RAC stock from Martos.
 - (b) The only information which Martos gave him about the company is that it "makes a machine".
 - (c) Martos told him nothing about RAC's history of sales or earnings and made no financial statements available to him, and

- 23. (a) "Gasparis and his family attend the same church as Martos, are close friends with the martos family and socialize frequently.
- (b) he is not an engineer, nor does he have high technical capacity, but he well understands the function of the Automatic Unloading Unit and its industrial importance.
- (c) He was aware that the company had
 no sales or earnings and was informed
 of all of the other financial facts
 by Martos, the Corporation's financial

oficer and accountant

- 23(a)"Gasparis" purchased 500 spares
 frpm Martos, a dose personal and
 social friend.
 - (b) He knew the Corporation product to be a sophisticated Automatic Unloading and Packaging Machine.

(c) He had access to all financial fasts from Martos the Corporate's financial officer and accountant.

.E.C. 'S AFFIDAVIT

R.A.C. 'S AFFIDAVIT

(d)He feels that he may sell the stock at will and was never told that he must hold it for any specified period.

(d) He signed as investment letter of intent, and know that he could not sell the shares except incompliance with legal considerations_including SECapproval.

(d) is signed a letter of inve

24.0g June 6,1972 at 3:30FM I interviewed Mr. Michael Dismentis ("Dismentis") at the Commission's New York Regional office. He told me that:

(a) Martos offered and sold him 2,500 shares of RAC stock but told him nothing about RAC's history of lack of sales or earnings;

(b) Martos made nofinancial states ments available to him, and

(c) Martos told him that the stock

24(a) "Dissentis" bought 2500 24. (a) "Dismentis" is a close friend of Martos free Martos, als accountant who does his personal and business accounding. over the years, a close bond of trust between personal friend. then has developed. He was aware that the had no prior sales or earnings, but spent its capital on development of a working Automatic

(b) Since Martos was his personal accountant, he (b) me relied on Martos inte rolled on the latter to interpret any financial statements of the Corneration (c)ne voluntarily signed an investment letter

of intent, understanding that the stock t

Unloading and Packaging Unt.

of the Corporation's (c) He signed as investment 25.0n June 7,1972 at 11:00A.M. I interviewed Mr. Damismos Nomikos ("Mossikos") at the Commission's New York Regional

(a) inrtos offered and sold him500 shares of EAC stock but never told him "what the company does";

office. He told me that:

(b) Martos showed him a picture of a machine and undermeath of the picture was a statement that the machine was patented;

(c)Martos told him that the stock

not to be said until approval by the Countseion.

- (a) Martos is a friend and the personal accountant of "Nomikos" and they see each other weekly on a business and solcial basis.
- (b) They frequently discussed the Company's affairs, its early stage of development, and the product's special features. Nomikos not only saw Company literature, but had all his questions about the Company, its personnel and activities assured truthfully and had
- (c)He was never told emphatically that the stock price would were madely
- but if the confunction drifted to potentia

- in ail company date.

- (a) "Nomikos purchased 500chares from Martos, his personal accountant and Speial friend.
- (b) He had access to the Company
 literature, advertisements and records
 through Martos.

(c) is relied pe Martos analysis of

(d)He doesn't know that use was made or is to be made of the proceeds from the sales of the stock, and

(e) He never entered into an agreement with Martos or anyone at HAC regarding the length of time he would have to hold the stock before it could be sold.

26. On or about June 12,1972 Herold

Schurr ("Schurr") was interviewed

by me by telephone. Schurr told me:

(a) That he was offered and sold 100

Tents about possible customers and users of this machine, and if Tserpes production experience was discussed it is natural that "Nomikos" drew his own conclusions.

(d) Nomikos" was told that the capital raised by the stock sale would be used for the interest of the business at the discretion of the officers. He relied on Martos, as his accountant, for analysis and interpretation of the company's financial statement.

(e)"Nomikos" signed an investment letter and knew the stock could not be resold except in compliance with the law.

(d) He relied on Martos for regularity in the use of Corporate capital.

(e)He signed a letter of investment intent.

a)Herold Schurr id a long time friend

(a) "Schurr bought 100 shares from Hame

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S.E.C. S AFFIDAVIT	R.A.C.'S AFFIDAVIT	CONCLUSION
SHARES of BAC stock from Hance.	and neighbor of defendant Hamos. They	his friend and neighbor.
	are in almost daily contest.	
(b) That mamos had delivered the stock	(b) It is true that Hamos made the stock	(b) Hamos personally delivered the shares.
certificates to him.	delivery in person.	The second secon
(c)That no literature or financial	(c)It is not true that financial state-	(c)He had access through Hamos to all
statement were given to him in	ments and corporation literature were	Corporate information usually available
connection with his purchase of the	withheld, but rather that Schurr received	through registration.
stock.	the same material as generally appeared	
	in the proposed offering circular	
	submitted to the Commission in connection	
	with the Regulation A offering, and had	
	access to all Company information.	the second secon
(d) that he believed that he could sell	(d)Schurr signed a letter of investment	(d) He signed an letter of investment inten
his stock at any time, and	intent which was submitted to the Commission.	
(8) That Hamos told himnothing about the	(e)Hamos answered every question raised by	(e) Information on Company business was
financial condition of RAC or that it had	schurr about the business factors of the	provided by Hamos on request.
experienced no sales or earnings.	Corporation est rade entirely clear by	
	the literature referred to in (c).	
and the same of th		
and the matter a matter and the state of the	All a Comments of the second o	A APP IN THE THE PARTY OF THE P

22.On or about June 12,1972 Hyman Bartikosky ("Bartikosky") was contacted by me by telephone. He stated:

(a) That Hamos offered RAC stock to himin 1971, telling him that it would become listed an the New York Stock Exchange and would be "fantastic" stock; and

(b) that Hamos told nim nothing about the finances of RAC or that it had not had sales or earnings. (a) Hamos discussed the Corporation
with "Bartikosky" a friend and neighbor
but never applied any sales efforts or
pressure, nor did he promote the stock.
There was no representation that the
company stock would be listed on the
New York Stock Exchange or that it was
"fantastic". The onlyconversation was in
relation with the Automatic Unloading
and its unique character.

(b) "Bartikosky"was not interested in seing the financial statement or literature of the Corporation and asked for none. He never purchased stock nor was he solicited.

(a) "Bartikosky" did not purchase the Corporate stock.

(b)He wass friend and neighbor of Hamos and did not examine or see Company financial statement and records . 28.0n June 8,1972 at 2:30 p.m.I interviewed

Mr. Dimitrios Tomais("Tomais") at the Commission's New Yark Regional office.

He told me that:

(a) he wasoffered and sold 500 shares of

RAC stock by Martos who told him nothing about ehe Corporations sales or
earnings and who never made any financial
statements available to him, and

(b) Martos showed him a picture of "the machine" and told himit was patented.

. Martos and a friend of several years. They see each other weekly. They had extensive discussions about the Company's product and business operations so that Tomais was fully informed that the Corporation had completed development not sales. (b) during the discussions, Tomais expressed interest in the product and asked to view Corporation literature, which includes photos of the Automatic Unloading Unit The literature stated that there was a "patent applied" and noassertion was made about an absolute patent being issued for the unloading machine, only that it carried patent "rights". It should be remembered that referen

to the issuance of patent were possibly made

(a) "Tomais" is an accounting client of

(a) "Tomais" purchased 500 shares of

Company stock from Martos his accountant

and friend, He had total access to the

Company financial statements and records

through Martos.

th) He saw a photo of the Automatic
Unloading and Packaging Unit and was
informed of its patentable features and
the Company's patent rights and
claims.

about the Automatic Box-Forming Mahline and other Teerpes' inventions.

29. The above mentioned interviews with investors do not purport to be all inclusive. Other investors were interviewed by me and other staff members both in person, by telephone and via the mails. The investigation indicated that the investors knew little about RAC and its product. They were told nothing about RAC's complete lack of sales and earnings or anything about BAC's financial condition. In fact, literature which was sent to them contained material representations regarding RAC's product, business. earnings, potential and projection for the future price of the stock. (see Exhibit E attached hereto).

29The conclusory statements of Mr. Jacobs are totally unreliable in the absence of written transcripts of the interviews in the presence of a qualified interpreter. He tries to leave the impression that these stockholders invested their money blindly in spite of the documented proof that they were entirely familiar with the corporation's business, and invested only on judging to potential to be fatorable. Not a single stockholder was misled about the operations, lack of sales or earnings. realizing that the major hurdle was to mass produce the developed Astonatic Unloading and Transfer Unitin advance of sales. The literature regarding the product was 100% accuratees was the other facts about the

29. Prior to the purchase, all stockholders were solicited personally without the use of communication media They had access to all Corporation financial records. Literature distributed to existing stockholders contains no material misrepresentations. An erro pme , magazine which depicted the thit as "patented" instead of "patent applied"was due to the publisher's error. A letter to a stockholder informed the share owner of future company plane and an expected registration price for the company shares

If an error inlitenture published by a third party occurred, it was not caused by the defendants. Nor were the patent rights in the Automatic Unloading un't lost by the abandonment of the patent application. Section 137 of the Rules and Practice in Patent Cases enables the applicant to revive an application abandoned by the Patent Office Action, which was the situation here. A hew U.S. Patent Applied has been issued for the Automatic Unloading Unit, No. 290, 331. Reference to Exhibit "E" by Mr. Jacobs, in effort to show misrepresentation is also misguided. That exhibit is a letter to an existing stockholder, not an offeree, and intends to convey information about the Company plans. In that context and only if the comemplated business deals materialize, is that final paragraph meaningful.

The last paragraph deals with an expected offering price pursuant to full public registration, and is not intended to suggest a potential stock value.

in 1968 and 1969. Defendant Martes was retion Michael Manos ("Manos") an cities of RAC who is not named in this suit \$3000 to MAC in1967. Hanns was rest: 134 entire indebtedness in 1971. Defendant Hamos testified before staff members :: the loans of Martos and Manos were Terail from the proceeds of the saie of store to investors. The investigation conjucted in this office revealed that this is: was not told to any investors by any the defendants.

30. The investigation revealed that is in the loss to the Corporation from Martos Martos losned an aggregate of\$35.000 to BAC and Hamos were not pepaid from capital subserintion, nor was that the purpose of the paid \$27.000 by RAC on Sept.1.1971. In aid: private sale. Martos has more invested in the Corporation today than he had previous to the start of the repayment. Those recayments were made to conform to the maturity dates of the loans and for no other reason. Nather Martos nor Hamos sought to recover their invested money. Rather they reinvested for the further progress of the business. Their first Advances were use work. Their most recent are being used for mass production. They believe in the Corporation and are standing by it with their money. The stockholders were sware that they were investing in a new company that expended considerable money in development of the Automatic Unloading Machine,

ed their review of the financial statements, and

30. Martos loaned \$35,000 to the Company in 1968-1969 and Manos, another officer loaned \$3000 in 1967. Manos was rehald in full in 1971 and Martos was repaid \$27,000 in 1971. Martos released capital to the Comment, so that he has a larger investment today than he had wh en repaid at maturity the earlier · ipan. The stockholders knew that money borrowed to develop the Automatic Unloading Unit would be repaid to the lenders. Their capital investment was for shares in the Corporation assets and fature earnings, fully realizing the nature of the product.

officers. Common sence and logic rescaled that borrowed money would have to be repaid when due. What they were paying for, however, was stock in a Company with a developed machine of a unique nature, and, in their eyes, well worth their invaluent.

Office in Washington, D.C. and examined the files for Patent Application numbers

155,138 and 434,507 for Tserpes' Automatic

Transfer Unit. My examination of the files revealed that in 1961, Tserpes filed an application with the U.S. Patent Office for his Automatic Transfer Machine. On March6, 1967 a patent examiner entered a final rejection to the application. Teerpes argualed this decision and on August 30.

31. The Corporation was only represented that it was issued Patent Application.

No. 110,004 by the Canadian Patent
Office. Proof of that fact was submitted as Embibit G to Tserpes' affidavit dated
October 18,1972. Jacobs' charges deals with two unrelated U.S. Patent applications.

tions Nos. 155,138 and 434,507. These were withdrawn by Patent Office Astion and were capable of being revived by the applicant. The revived application was submitted as September 18,1972 and offered as Embibit

made in 1961 by Tserpes for the
Automatic Unloading Unit was
rejected on 3/6/67 by a U.S.Patent
examiner and 8/20/68 by the Board
of Apraels. It was therefore
abandoned by Pateent Office action.
Tserpes revived the application on
9/18/72 and was issued No. 290,321.
The Canadian Patent Pending 110,064
was never rejected or abandoned and

Patent Office affirmed the decision of the Patent Examiner. Because Isarpes did not appeal the Board's decision in the U.S. Courts, the Patent Office officially classified Tserpes articing as abandoned. (see Exhibit F attached hereto) 1 My investigation has reveries however, that all ...vestors of it. were sent literature and correspondence on at least one occassion which state: the Automatid Transfer Machine was patented, or there wasa patent periing on it. No investor was ever told by are defendant that the patent application of Therpes for mis machine was Telecie and then abandoned (see Ekhibit G attached hereto).

to Tserpes' affidatit on October 18,
1972. The new number issued by the
L.S. Patent Office was 290,331. In
addition, applications were previously
filed in FRance, West Germany, and
Lagland.

it is apparent that Jacobs did not inderstand the quality of Tserpes patent rights, notwithstanding the records the U.S. Patent office. The patent glains of Tserpes cannot be infringed by anyone without risk of suit. In that connection it is pointed out that there are over 60 separate claims andthat even the tools, jigs, and dies are patentable.

Examiners rejection was highly technical based on inadequate disclosure (35 USC112) and lacking utility (35 USC101) as an inoperable device. Subsequent to the sejection, an actual working unit was

CONCLUSION?

was referred to in all company
representations . Because of the
numerous claims and special
patentable features, the patent
rights of the unit cannot be infringed
and afford complete protection to
stockholders. The Automatic unit is
manufactured by unique tools and dies
and was awarded an Industrial
Research price in1972 for its outstanding features.

CONCLUSION

32. The investigation revealed that RAC send through the mail a notice of annual meeting to its shareholders on or about May 10, 1971. Icluded with the notice were a financial statement as of Farch 1,1971 and accompanying notes to the financial statement. In the financial statement BAC assigned a value to tic Transfer Units of \$90,000. kaC further assigned a value\$235,000 to a "patent applied"for Automatic Transfer Unit". Both of those figures were reflected as assets of RAC. However, in the financial statement substitued to the SEC inconnection with RAC's proposed effering circular

of the world's outstanding technical products of 1972. It should be readily apparent that under the present circumstances, such technical objections will dissolve. 32. The value of \$90,000 for the 7 Automatic Transfer Units, and \$235,000 for patent applied, recited in the financial statement of March 1,1971 were an accurate reflection of cost, and were not misleading. These were development units, not mass produced units, and included the actual cost for the raw materials, and tooling in addition to the design and development efforts of Eserpes reflected in the Company's books of account. They differ with the value of \$3.085.25 assigned to 1 oprational unit in the financial statementsubmitted pursuant to

produced and received an award as one

32. Actual development costs of the
7 Automatic Units referred to in the
5/10/71 notice of annual meeting to
shareholders and 3/1/71 balance sheet
were \$90,000. The cost attributed
\$p one operational unit in the amount
of \$3,083.25 as feflected to the
3/10/72 offering circular for the
Regulation A e-emption and
was the figure suggested by the SEC
staff. Patent rights of\$235,000
empaged to the Automatic Transfer
Emit in the 3/1/71 balance sheet
compares favorably with the \$369,000

ursuant to the Regulation A exemption on March 10,1972 the value assigned to one operational transfer unit was only \$3083.25. Teerpes stated in testimons before me and the other staff members on May 5,1972 that the one Automatic Transfer was, in fact, valued at cost, \$3,083.25. In addition, as set forth in paragraph 30 of the Automatic Pransfer Unit had been abandoned in 1900. Accordingly, both figures carried as assets in the financials sent to stockholders were fictitious and misleading and operated as a fraud and deceit upon the stockholders (seenthibit is attached hereto).

Mr. Bienenstock of the Commission's devalorment cost for an accounting staff instructed the Corporation average 1972 prize winner to use that figure. of an Industrial Pessarch The latter cost would be accurate after pass award/ production bega: in earnest. However, it was not a true reflection of the single developed unit. The explanation set forth in Paragraph 31 explains and justifies the assigning of a value for patent this afficient, Iserpes patent application for rights. It is noted that the average development cost of IR-R 100winners in 1972 was \$369,000. To suggest that either of these financial figures are fictitious or misleading is a travesty and the result of tortured reasoning and a prejudiced mind.

33. The means and instrumentalities of interstate commerce, specifically the United States delivery of stock made by phone or mail. The mails and the telephone were used for the purpose of offering, selling and delivering after sale the Common Stock of RAC.

33. There were absolutely no sales or offers or Commission recognized this in their memorandum to the Second Circuit Court of Appeals deted February 13, 1973.

33. There were no sales or offers or delivery of stock by public media.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEWYORK

SECURITIES & EXCHANGE COMMISSION

. Plaintiff,

72 Civil 3513 (SJR)

- against -

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES BASIL MARTOS ATHAN HAMOS

Defendants,

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS APPLICATION FOR LEAVE TO SUF THE UNITED STATES OF AMERICA

Respectfully submitted,

KONSTANTINOS M. TSERPES
BASIL MARTOS
ATHAN HAMOS
Defendants Pro Se
333 West 39 Street
New York, N.Y. 10018

Dated: New York, New York July 12, 1974

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

72 Civil 3513 (SJR)

Plaintiff,

- against -

MEMORANDUM OF LAW IN SUPPOR OF DEFENDANTS APPLICATION FOR LEAVE TO SUE THE UNITED STATES OF AMERICA

RESEARCH AUTOMATION CORPORATION KONSTANTINOS M. TSERPES
BASIL MARTOS

RASTL MARTOS ATHAN HAMOS

Defendants

PRELIMINARY STATEMENT

pefendants desire leave of Court to serve a third party complaint upon the United States of America pursuant to Pules 13 and 14(a) of the Federal Rules of Civil Procedure. In effect the action would be in the nature of a counterclaim if the United Satees was the named party in the action—in—chief. However, since the United States is the real party in interest because the wrongful acts have been committed by its agents, and since the named party in hhe action—in—chief is an agency of the United States, the method of redress is via third party complant.

FACTS

The Commission took action in August, 1972 that totally prevented defendants from issuing stock pursuant to a Regulation A registration submitted for the third time by

the defendants in March, 1972. That action was the obtaining of a stay and the institution of a proceeding for a preliminary injunction and commencement of an action for a permanent injunction against defendants for alleged violation of the Securities Acts. Earlier, the Commission had effectively frustrated the issuance of stock by returning and rejecting the notifications and offering circulars submitted by the defendants on the grounds that they were generally inadequate and deficient without specifying the defects and inadequacies.

Defendants resisted the Commission's prosecution, and ultimately in October, 1973 after several motions and an appeal had been litigated, a portion of the Commission's action was dismissed and the injunction was vacated. Thereafter, a series of conferences were held in an effort to terminate the prosecution and clear the way for the Regulation A offering. The conferences became stalemated. After a long delay, the Commission resumed their prosecution by inaugurating discovery proceedings which became bogged down in controversy and is currently awaiting decision by Honorable Sylvester J. Ryan ufter his referral of the matter to Honorable Harold Raby, for a report. The Commission seeks to strike the defendants' answers and to enter a default judgement without the holding of a trial on the merits.

The gist of this application is that the Commission persisted in committing post-discretionary, actionable wrongs in the course of perfoming operational details, either negligently or excessively, even after clear facts became known that the defendants did not violate the anti-fraud provisions of the securities law and rules. Thus, the government's liability for tort began when the true discretionary acts of the Commission ended. Further, the proposed complaint charges that the Commission discriminated against the defendants and all of the Company's admittedly private shareholders who were termed "unsophisticated Greek immigrants".

ARGUMENT

POINT I

THE COURT HAS JURISDICTION TO ENTERTAIN THE MOTION HEREIN

Contrary to the distorted contention of plaintiff, the basis of defendants' proposed complaint is naturally not its own alleged "filegal" actions in selling stock, but the Commissions' continuation in prosecuting the defendants even after the absence of defendants' wrongdoing was plain and evident. Rule 14(a) clearly contemplates the use of a third party action where such liability may exist under the Federal Tort Claims Act. 28 USC 1346 (b).

As to the suggestion that the application is untimely pursuant to Rule 16, it is apparent from a reading of the complaint that the events and actions of the Commission is disregarding the subsequent findings of the Court that defendants did not violate Section 5 of the Securities Act of 1933, and the documentary showing that defendants committed no fraud, created the special circumstances that cry out for this as the exceptional case permitting a delay in commencing the third party action. These new facts clearly distinguish the case at bar to those cited by the Commission at Page 8 of its Memorandum.

POINT II

THE COURT HAS JURISDICTION ON THE SUBJECT MATTER IN THE PROPOSED COMPLAINT

There is no dispute that the United States of America has given its consent to being sued under the Federal Tort Claims

Act. 28 USC 1346 (6). The Commission points out the two types of statutory exceptions to this consent to being sued for tort

"liability expressed in 28 USC \$2680(a) and (h).

Subsection (h) specifies the excluded intentional torts, but noticeably missing from the list is fraud. Admittedly reference to misrepresentation and deceipt come together and are fraud.

the complained of tort can be more closely defined as an abuse of, and an incautious exercise of, authority, akin to malpractice.

Which brings us to the other exclusion, recited in subsection (a), where the agency or employee excercises discretion, even where it is abused or negligently employed. That exception has not been recognized by the courts where the actions are non-discretionary, or occurs after the exercise of discretion ends. See 99 AL^{2d} 1106. If the action of an agency or employee involves operational details when executing a program or project, those acts are not immune from liability under the "discretionary function" exception. Indian Towing v. U.S. 350 US 61 Rayonier v. U.S. 352 U.S. 315, Somerset Seafood v. U.S. 193 F2d 631.

Baruski v. S.E.C. and the other cases cited by the Commission are distinguishable. Baruski originally sought a mandatory order compelling the Commission to approve his registration statement. Then he amended his application to request that the Commission be prevented from frustrating and obstructing the processing of the registration. At no time was a complaint spelling out a cause of action instituted. The Courts reference to \$2680 only concerned charges by the

S.E.C., that were termed "false, undefined, vague and assumed" by Boruski who further contended that it interfered with his engaging in business.

The facts also differed in that Boruski had previously been barred as an investment adviser and his broker-dealer registration has been revoked. In addition he failed to sign the registration statement nor did he file the reguired certified checks. Finally, the Commission never took affirmative "stop" action.

The case at bar differs in all the aforementioned respects from Boruski in that here defendants continued in business, but were damaged in concrete pecuniary ways by the increasing cost of financing, delaying production, and suspending other design and development work for additional technological achievements. Further, the defendants credentias and reputations were impeccable, they complied and completed with Commission filing requests and the Commission instituted affirmative "stop" action via the injunction proceedings.

Nor, is the Angel case applicable to the premises. Here, the libelous statements concerning the defendants Greek origin are the basis for the charges of discrimination, not for libel. It was this theme that defendants and the private stockholders were "unsophisticated Greek immigrants", asserted in the supporting affidavit of Mark Jacobs to the Commissions application for a preliminary injunction in August 1972, that set the pattern for subsequent administrative actions and attitudes that denied defendants the equal treatment they were entitled to under the Securities Law. They were harassed and browbeaten for not doing things in the conventional way, through hiring legal counsel and professional underwriters.

It is axiomatic that discrimination against a person which deprives one of rights, privileges or immunities are secured by the United States of America. The 5th Amendment clearly embraces the United States of America within the legislative scheme encompassed by the Civil Rights Act. 42 USC 1983.

POINT III

LEAVE OF COURT TO SERVE A THIRD PARTY COMPLAINT DOES FOR CONSTITUTE IMPERMISSABLE JUDICIAL REVIEW

The Commissions argument that judicial review of its administrative actions is precluded by \$5(a) of the Securities Act and \$25(a) of the Exchange Act, are irrelevant. Defendants do not seek judicial review of administrative action through their application for leave of court to see the United States.

The action-in-chief remains and review of administrative determinations in that action, are reviewable under the stated sections.

What the Court is called upon to determine is the merits of defendants' contention that they have been aggrieved by illegal and improper conduct of the Commission and are entitled to sue for that grievance, without passing upon that conduct as administrative actions subject to judicial review. The latter consideration is an entirely separate issue.

The nexus of defendants' argument is that the time of discretionary action, i.e., the making of policy decision in the case, had long passed, and that the continuance of the legal action and prosecution of the complaint against the defendants in the face of new evidence and court action dismissing part of the complaint, and the Commission's continued obstruction of the Regulation A stock issuance processing, were the kind of operational details performed by the Commission that injured defendants.

CONCLUSION

The defendants have been illegally aggrieved by non-discretionary acts of the agency and employees of the United States of America, and these acts were not excluded by statute subjecting the United States of America to liability, and defendants are entitled to leave to sue in a third party action.

Respectfully submitted,

KONSTANTINOS M. TSERPES

BASIL MARTOS

ATHIN HAMOS

Defendants Pro Se

333 West 39 Street New York, N. Y. 10018

Telephone No.: (212)947-1460

Dated: New York, New York July 12, 1974 SECURITIES AND EXCHANGE COMMISSION : Plaintiff, :

72 Civil 3513 (SJI)

-against-

REPLY AFFIDAVIT

RESEARCH AUTOMATION CORPORATION KOMETANTINGS M. TSERPES BASIL MARTOS ATHAN HAMOS

Defendants,

KONSTANTINOS M. TSERPES, being duly sworn, deposes and says:

- 1. This affidavit is in reply to the opposition papers suimitted by the U.S. Securities and Exchange Commission (Commission) directed against defendants' application for leave to serve a third party complaint against the United States of America.
- 2. The comments below are intended to rebut the affidavit of Alexander Bienenstock. Deponent further requests permission to be granted until July 15, 1974 to reply to the Commission's 34 page Memorandum of Law.
- 3. Mr. Bienenstock omitted several transactions between the parties that occurred in 1971. On June 18, 1971 a corrected notification was filed with the Commission (see forwarding letter, Exhibit 1). It was returned by the Commission under a covering letter (see Exhibit 2) dated June 23, 1971.
- 4. It was after this second attempt (at Regulation A filing) was returned, that the March 10, 1972 submission was made. Although letters of explanation had accompanied the two prior filings, the the discountry brought a form letter of acknowledgement on March 14,1974 (see Exhibit 3) shortly after which an investigation was started.

to sell or offer stock at their orn risk after the passage of 10 days from filing, but it is an obviously facetisus comment inasmuch as a Commission investigation and court issued injunction hovered over the issuance at all times and the defendants could not be expected to act impredently.

as exhibit B to Bienenstock's affidavit was not prepared until after. knowledge and service of defendants' motion papers for leave to sue the government, and was palpably drafted in a lengthy and extensive fashion so as to infer that the defendants registration was patently unprofessional. It is respectfully argued that the usual letter of comment prepared by the Commission in the ordinary case is not so calculated to embarrass and harass an issuer. The practice resorted in the case at bar, tends to support defendants underlying claim that the Commission is petty and spiteful, and its employees resented the efforts of defendants to file their registration without counsel or underwriter.

7. It might be asked of the Commission why they bothered to delivery a letter of corment at all to the most recent filing by the defendants on May 17, 1974, when they had unequivocally shelved it on three prior occasions. A truthful answer would be that the Commission acknowledged its former developing, and postessed a sense of mult as it cought to cover up its acts of miniculance.

unferroles, defendants respectfully request that leave to serve a third party complaint against the United States of America be granted.

-2- Konfrontof MGEQ

Evern to before me this

10 "day of July, 1974

COUNTY FOR IT NAMES

CONTINUE IN SOME OF IN STORY

CONTINUE IN SOME OF INSTRUCTION

TO SEE AND FOR THE STORY

TO SEE AND F

RESEARCH AUTOMATTON COMPORATION

(A HEN YOUR COMPORTION, INCOME.COTED ENBMARY 2, 1965)

145,665 SHARD OF COMMON STOCK

(Par Value 2.01 per share)

OFFERING PRICE: \$3.00 PER SHARE

THESE SECURITIES ARE OFFERED PURSUANT TO AN EXEMPTION FROM PROTETRATION HITH THE UNITED STATES SECURITIES AND EXCHANGE CONTINUES. THE COMMISSION DOES NOT PASS UPON THE LEBRETS OF ANY SECURITIES NOW LOSS IT PASS UPON THE ACCURACY OR CONTESTED OF ANY OFFERENCE CRESULTAR OR CONTESTED LITERATURE.

TURSE SECURITIES ARE OFFERED AS A SPECULATION

Per Share	Offering Price to Public (1)		Underwriting Discounts and Consisten (A)	Proceeds to Corporation (3)	
	\$	3.00	Hone	\$	3.00
Total Offering	\$1,37,595.00		llone	\$423,595.00	

- (I)THE OFFERING PRICE HAS BEEN ARBITRARILY DETERMINED. PHIOR TO THE DATE OF THIS CAFALING CHROMAN AND SOLITATION OF THE PRESENT AND PUBLIC MARKET BOTH TO COLOR STOCK OF THE COPPANY AND NO REPRESENTATION IS TABLET AND TO CALL BE RESCRIBED AT THE OFFERING PRICE.
- (2) The Company proposes to offer the Shares through solicitation in States were such solicitation is permitted (as rore fully described under "Nethod of S les").
- (3) Net proceeds to the Company are estimated to be approximately \$\frac{1}{23}\$,595.00 after deducting estimated, empences of this offering of \$12,000.00 which includes commissions, cost of printing, counsel and accountant fees. At a later time underwriters, dealers, or agents may be employed, in which case a cormission paid to them would reduce the proceeds to the Company by \$\frac{1}{2}\$.30 per share (or by a maximum of \$\frac{1}{2}\$,700.00) of all shares that are sold through underwriters. Underwriters, if any, will not be reinbursed for their expenses. Should the Commany offer all or part of the issue through underwriters, de lers, or agents the Offering Circular and Notification under Regulation A will be amended prior to their employment.

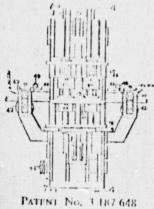
The shares are being offered subject to prior sale. The Company reserves the right to withdraw, cancel or nodify such offer without any notice and reject orders in whole or in part.

RESEARCH AUTOMATION CORFORATION

333 MET 39 STREET

1001 YOLK, MAI YOLK LOOIS

The date of this Offering Circular is June , 1971.

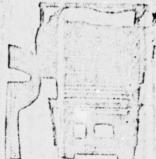


RESEARCH AUTOMATION CORPORATION

R. A. C.

Patented Machine Designers and Manufacturers

333 West 39th Street • New York, N. Y. 10018 111 18 19/1 TELEPHONE: 947-1460, 563-4037



PATINT APPIND .

Juno 18, 1971

V. S. Securities Exchange Continuion 26 Fodoral Plana Now York, H. Y. 10007

Attention: He. Kevin Thoma Duffy, Region Administrator

Done Hr. Duffy:

In accordance with the rales of Regulation A, we are enclosing horewith the fellowing documents in original and three copies:

- A. Offering Giranian of Mescarch Automation Comparation.
- B. Form 1-A Notification
- C. Dy-Laun of Renearch Automation Corporation
- D. Cortificate of Incorporation of Research Automation Corporation and Americant out to Cortificate of Incorporation dated 6/17/70.
- E. Form Letter and Subscription Agreement

Advertisement reberial for the above Offering will be submitted as seen as it is available in accordance with Perographs I thru & of Rule 255, Page 6, of the Repullition A miles.

to kindly request your proupt attention in this ratter.

Very pincerely,

HOLDER DESIGN HOLDER OF WAR OF WALLE LOS

Low Control Miller Monotontinos II. Toermes renident.

MAT:a Inc.

ONLY, COPY AVAILABLE



UNITED STATES

SECURITIES AND EXCHANGE COMMISSION REGIONAL OFFICE 26 FEDERAL PLAZA

NEW YORK, N.Y. 10007

MY:SI:AB

June 23, 1971

Research Automation Corporation 333 West 39th Street New York, New York 10018

Ra: Proposed Offering of "Research Automation Corporation"

Dear Six:

The material filed by you on June 18, 1971 in connection with the above is being returned to you hercuith (less one copy which we are keeping for our files).

The material in its present form is unacceptable for processing by the stoff. We suggest that you utilize our Public Reference Room located on the 11th Floor of 26 Federal Plaza, New York, New York 10007; There you may examine prior Regulation A offerings, and their accompanying amendments, which have become effective. This should be used as a guide in the preparation of your own material.

Should you desire further assistance you may tlephote this office:

Sincerely yours,

KEVIN THOMAS DUFFY ... Kegional Administrator

Michael H. Stoedberg, Chief Branch of Small Isques

Enclosure

ONLY COPY AVAILABLE

EXHIBIT - 2

104

OHITED STATES

SECURITIES AND EXCHANGE COMMISSION

NEW YORK, N.Y. 10007

March 14, 1972

Research Automation Corporation 333 West 39th Street New York, New York 10018

Re: Research Automation Corporation

24NY-7084

Dear Sir:

This is to acknowledge receipt of your letter of Notification under Regulation A on Form 1-A filed in this office on 3/10/72 , to which we have assigned the number 24NY-7584. A preliminary inspection of the material filed indicates that it is acceptable for processing by the staff but contains deficiencies which, if not corrected, would render the exemption unavailable. In due course this office will furnish you with a letter of comment suggesting amendments in order to correct the detreiencies.

The responsibility for meeting the requirements of Regulation A rests with those who desire to avail themselves of the exemption. The offering should not be commenced until the filing, as well as subsequent amendments, has been reviewed and notice given that the staff has no further comments with respect to the material filed.

Although every attempt will be made to begin immediate processing, delay might be encountered because of the heavy volume of filings and other staff demands. Therefore you should be prepared to up-date the required financial statements if necessary.

Very truly yours,

KEVIN THOMAS DUFFY Regional Administrator

By Glasen Des Benevaloch

Michael H. Goldberg, Chief Branch of Small Issues

